TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 167.

ABBY BALL KNAPP, PLAINTIFF IN ERROR,

vs.

THE HOMŒOPATHIC MUTUAL LIFE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED NOVEMBER 9, 1882.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court of Massachusetts.]

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Abby Ball Knapp, of Boston, in the county of Suffolk and district of Massachusetts, plaintiff, and the Homœopathic Mutual Life Insurance Company, a corporation organized under the laws of the State of New York, and having a place of business in said Boston, defendant, in an action of contract, a manifest error happened to the great damage of the said plaintiff, as by her complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-first day of October, in the year of our Lord one thousand eight hundred and eighty-one.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
JOHN LOWELL,
Circuit Judge.

Due service of this writ of error and of citation thereunder is acknowledged by the defendant in error.

ALLEN, HEMENWAY & SAVAGE,
Att'y- for Def't in Error.

2 CIRCUIT COURT OF THE UNITED STATES, *District of Massachusetts,* } *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court, this twenty-second day of September, A. D. 1882.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. SETSON, *Clerk.*

SAM'L W. CLIFFORD, JR.,
For Pl'ff in Error.

Boston, Mass.

ALLEN, HEMENWAY & SAVAGE,
Of Boston, for Defendants.

3 UNITED STATES OF AMERICA, *Massachusetts District,* } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Before the Honorable Thomas L. Nelson, district judge.

4 ABBY KNAPP, of Boston, in the County of Suffolk, in the Commonwealth and District of Massachusetts, Plaintiff,

v.

THE HOMŒOPATHIC MUTUAL LIFE INSURANCE COMPANY, a Corporation organized under the laws of the State of New York and having a place of business in Boston, in the County of Suffolk, in said Commonwealth, Defendant.

In an action of contract.

The writ in this cause is dated the nineteenth day of March, A. D. 1878, and is made returnable before the justices of the superior court of the Commonwealth of Massachusetts, then next to be holden at Boston, within and for the county of Suffolk, on the first Tuesday of April, A. D. 1878. This cause, after entry in said superior
5 court, was removed to this circuit court, and here entered at the May term, A. D. 1878, when and where the parties appeared, by their respective attorneys, and the defendant filed the following attested copies of papers on file in said superior court, namely: 1, writ; 2, petition to remove cause to circuit court, and, 3, bond for entry; which papers are in the words following, namely:

Writ.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

[SEAL.] To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of The Homœopathic Mutual Life Insurance Company, a corporation organized

under the laws of the State of New York and having a place of business in Boston, in the county of Suffolk, to the value of ten
6 thousand dollars, and summon it to appear before our justices of our superior court, next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of April next, then and there in our said court to answer unto Abby Knapp, of Boston, in said Suffolk, in an action of contract, to the damage of the said plaintiff (as she saith) the sum of ten thousand dollars, which shall then and there be made to appear with other due damages. And have you there this writ, with your doings therein.

Witness Lincoln F. Bringham, Esquire, at Cambridge, the 19th day of March, in the year of our Lord one thousand eight hundred and seventy-eight.

Copy.

Attest: THEO. C. HURD, *Clerk.*
JOS. A. WILLARD, *Clerk.*

Plaintiff's Declaration.

SUFFOLK, *ss:*

Superior Court, April Term, 1878.

ABBY KNAPP *v.* HOME. MUT. LIFE INS. CO.

7 And the plaintiff says that on or about the 14th day of April, 1869, the defendant, on account of certain good and valuable considerations, expressed in the papers hereto annexed, marked A, agreed to insure the life of Charles L. Knapp, in the sum of $5,000.00, payable in case of death to the plaintiff in this action, and the said defendant agreed with this plaintiff, in and by the said contract of insurance, that after two annual premiums shall have been paid thereon this policy of insurance shall not become void, or be forfeited, by reason of the non-payment of premium, but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit: "The net value of the policy when the premium became due and is not paid shall be ascertained according to the combined experience of actuaries, rate of mortality, with interest at four per cent. per annum. Four-
8 fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of the premium and the assumptions of mortality and interest aforesaid." And plaintiff says that she and the said Charles kept and performed all the conditions of the policy until on or about the 16th day of January, 1874, when the premium lapses, and on the 17th day of September, 1874, the said Charles L. Knapp died, and the said policy was in force at the time of the death of said Charles, according to the provision for temporary insurance.

And plaintiff gave defendant due notice and proof of death, made a demand upon the defendant for the payment of said sum of $5,000.00, and defendant refused and continues to refuse to pay any part of said sum.

Wherefore your plaintiff says that the defendant owes her the sum of $5,000.00, with interest at 7 per ct. per annum from March 19th, 1878, a demand of payment having then been made.

ABBY KNAPP,
By her Att'y, SAM'L W. CLIFFORD, JR.

"A."

Policy No. 1022. Amount insured, $5,000.

Amount of premium $47.40. | THE HOMŒOPATHIC MUTUAL LIFE INSURANCE COMPANY OF THE CITY OF NEW YORK. | How payable, Monthly.

Age, 47 years.
[50 cts. Stamp, 50 cts.]

In consideration of the representations made to them in the application for this policy, which is hereby made a part of this contract, and of the sum of forty-seven dollars and forty cents to them in hand paid by Abby Knapp, wife of Charles L. Knapp, and of the quarterly payment of a like amount on or before the sixteenth days of July, October, January, and April in every year during the continuance of this policy, do assure the life of Charles L. Knapp, dry goods clerk, of New York, in the county of New York, State of New York, for the sole use of his said wife, in the amount of five thousand dollars, for the term of his natural life, commencing on the sixteenth day of April, 1869. And the said company do hereby promise and agree to pay the amount of the said insurance, at their office in the city of New York, to the said wife, for her sole use, if living, in conformity with the statute, and, if not living, to her children or their guardian (except as hereinafter provided), for their use, in thirty days, after due notice and proof of the death of the said party whose life is hereby insured, the balance of the year's premium, if any, being first deducted therefrom. It is, however, agreed that in case of the decease of the wife during the lifetime of the assured that the said assured may, at his option, substitute any other beneficiary under this policy. This policy of insurance, after two annual premiums shall have been paid thereon, shall not be forfeited or become void by reason of the non-payment of premium, but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit: The net value of the policy when the premium becomes due and is not paid shall be ascertained according to the "combined experience" or actuaries rate of mortality, with interest at four per cent. per annum. Four-fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium and the assumptions of mortality and interest aforesaid, or at his option may receive a paid-up policy for the full amount of premium paid: Provided, That unless this policy shall be surrendered and such paid-up

policy shall be applied for within ninety days after such non-payment as aforesaid, then this policy shall be void and of no effect. Policies granted at "homœopathic rates" are granted solely on the faith of the declaration in the application made therefore, that the assured employs a homœopathic physician or uses homœopathic remedies in case of sickness. If the assured shall permanently change his medical practice, notice is to be given to the company, and the assured shall thenceforth be required to pay the rates
13 demanded of those not using homœopathic practice. In case this policy shall be assigned or held as security, written notice thereof must be given to this company and due proof of interest produced with the proofs of death.

On payment of the policy to an assignee the original assignment duly proved or acknowledged is to be surrendered to and left with the company.

This policy is made and accepted upon the conditions herein contained and hereto annexed.

In witnesss whereof the Homœopathic Mutual Life Insurance Company has hereunto affixed its seal, and by its president and secretary signed and delivered this contract, in the city of New York, this fourteenth day of April, one thousand eight hundred and sixty-nine.

D. D. MARSHAL, *President.*
[SEAL.] E. A. STRANSBURG, *Secretary.*
Examined: F. B. M.

14 (*General Life—Wife A.*)

(Endorsed.)

Conditions upon which this policy is issued.

It is hereby declared to be the true intent and meaning of this policy, and the same is accepted upon these express conditions: That in case the said person whose life is hereby insured shall be personally engaged in under-ground blasting or mining, submarine operations, or the production of highly inflammable or explosive substances, or enter any military or naval service whatsoever during war (the militia not in actual service excepted), or shall pass beyond the protection of an organized government, or between the first day of July and the first day of November, travel or reside south of the parallel of 36° 30′ north latitude without giving notice to this company, or shall enter upon any aerial voyage, or if he shall die in con-
15 sequence of a duel or of the violation of the laws of any nation, State, or province, or if any of the material statements or declarations made in the application for this policy shall be found untrue, then this policy shall be null and void.

In every case when this policy shall cease and determine or become or be null and void all payments thereon shall be forfeited to this company, except as hereinbefore provided. All receipts for premiums are to be signed either by the president, vice-president, or secretary.

Agents of the company are not authorized to make, alter, or discharge contracts or waive forfeitures.

2. *Petition to Remove.*

SUFFOLK, *ss:*

Superior Court. April Term, 1878.

ABBY KNAPP *v.* THE HOMŒOPATHIC LIFE INS. CO.

And now comes the defendants in the above action and say
16 they are a citizen of the State of New York, a corporation duly established by the laws of that State, and their having their principal place of business; that the plaintiff is a citizen of the commonwealth of Massachusetts; that the matter in dispute, exclusive of costs, exceeds five hundred dollars, and they offer Addison J. Seward, of Boston, in said commonwealth, as a good and sufficient surety for entering said action in the circuit court of the United States for the district of Massachusetts on the first day of its session, copies of all process & papers as required by its laws.

By their att'ys, ALLEN, LONG & SAVAGE.

Filed Ap'l 10, 1878.

Copy.

Attest: JOS. A. WILLARD, *Clerk.*

3. *Bond for Entry.*

Know all men by these presents that we, The Homœopathic Mutual Life Insurance Company of New York, in the State of New
17 York, as principal, and Addison J. Seaward, of Boston, Massachusetts, as surety, are holden and stand firmly bound unto Abby Knapp, of said Boston, in the sum of five hundred dollars; to the payment of which to the said Knapp, or his executors, administrators, or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators.

The condition of the obligation is such that if the said principal shall enter in the circuit court of the United States for the district of Massachusetts, on the first day of its next hereafter session, copies of its papers, in an action brought against it by said Knapp, returnable to and now pending in the superior court for the county of Suffolk, and entered therein on the second day of April current, and of all pleadings, testimony, and other proceedings in the cause, said action being No. 6322 in said superior court, then this obli-
18 gation shall be void; otherwise it shall be and remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals this tenth day of April, A. D. 1878.

JOHN D. LONG, [L. S.]
For the Homœopathic Life Insurance Company.
ADDISON J. SEAWARD. [L. S.]

Signed and sealed in presence of—
C. M. PERRY.

SUFFOLK, *ss:* 10 AP'L, 1878.

I certify that I [am] worth, in real estate, over and above my debts and liabilities, the sum of $2,000.

ADDISON J. SEAWARD.

Subscribed and sworn to before me.

JOS. A. WILLARD, *J. P.*

Filed Ap'l 10, 1878.

Copy.

Attest: JOS. H. WILLARD, *Clerk.*

On the fifteenth day of May, A. D. 1878, the following answer was filed:

Answer.

The defendant comes and answers the plaintiff's declaration as follows:

18*a* First. The defendant admits that on or about the 14th day of April, 1869, it agreed to insure the life of Charles L. Knapp in the sum of $5,000, payable, in case of death, to said plaintiff, and that it issued a policy of life insurance therefor of the tenor set forth in the plaintiff's declaration.

Second. Defendant further admits that the premiums were paid on said policy until on or about the 16th day of January, 1874, after which time the plaintiff and said Charles wholly failed to pay the premiums thereon, and thereby the said policy was then forfeited, and became and from thenceforth was wholly void.

Third. Defendant admits that said Charles L. Knapp died on or about the 17th day of September, 1874, but defendant denies that said policy was in force at the time of the death of said Charles L. Knapp, according to the provisions for temporary insurance, or according to any provision or for any purpose whatever.

19 Fourth. The defendant admits that it refused to pay the plaintiff the sum of $5,000, and that it continues to refuse to pay the same or any part thereof.

Fifth. And the defendant denies that it owes the said plaintiff the said sum of $5,000 and interest, or any part thereof, and further denies each and every allegation in the plaintiff's declaration contained not hereinbefore expressly admitted or denied, and leaves the plaintiff to prove the same.

This cause was thence continued to the October term, A. D. 1878, of this court, when, on the twelfth day of March, 1879, the following agreed facts were filed, namely:

Agreed Facts.

19*a* It is hereby agreed by the above parties as follows:

1. A jury trial is waived. The case is to be heard by the court.

2. The affidavit of S.W. Clifford (marked A.—L. B. A.) is admitted, and it is agreed that Lewis S. Rich if present would testify as stated in said affidavit.

tion, paralysis, rheumatism? Yes. Spinal diseases, disease of urinary organs or any other vital part, rupture, scrofula, small-pox, spitting of blood, yellow fever, intermittent fever, pleurisy? What are the particulars, character, and duration of the diseases which you have had? Had rheumatism last summer in knee for about a week; no return of the disease; never have been sick abed since I had the dysentery at 3 y'rs of age.

10. Have you had any other serious illness, local disease, or personal injury, and, if so, of what nature and how long since? No.

26 11. Is there, to your knowledge or belief, now existing, any disorder or any infirmity or weakness tending to impair your constitution? No.

12*a*. Are your habits of life correct and temperate? Yes. B. Have they always been so? B. Yes.

13. Are you now or have you been in any military or naval service? If so, when, where, and in what capacity? No.

14*a*. Is your father alive or dead? *a*. Alive. If alive, at what age? 84. State of health? *a*. Good. Ages at death ——? Causes of death ——? B. Is your mother alive or dead? B. Alive. If alive at what age? B. 79. State of health? B. Good. Ages at death ——? Causes of death ——?

15*a*. How many brothers have you had? *a*. 3. How many are living? *a*. 1. What are their ages? *a*. 55. State of health of each? *a*. Good. How many are dead? *a*. 2. Ages at death? *a*. 27 & 40. Causes of death? *a*. Typhoid fever and inf. rheumatism. B. How many sisters have you had? B. None. B. How

27 many are living? B. What are theirages? B. State of health? B. Ages at death? B. Causes of death?

16*a*. Have either of your parents, brothers, or sisters ever had pulmonary, scrofulous, or any constitutional or hereditary disease? *a*. No. B. Have your grandparents (paternal and maternal) reached old age? B. Have no recollection of grandparents.

17. Name and residence of your usual medical attendant? Dr. G. W. Belcher, N. Y. city.

18. Name and residence of an intimate friend, not interested in the proposed insurance, to be referred to for information? George A. Wadleigh, with Schuyler, Hartley & Graham, Maiden Lane.

19. Are the above medical attendant and friend fully able to give information as to your present and general state of health? Yes.

20. What system of medical treatment do you employ when ill? Homœopathic.

21. Has any material fact, bearing upon your physical condition and family history, been omitted in the foregoing questions? Not to my knowledge.

28 It is hereby declared that the above are fair and true answers to the foregoing questions, and it is acknowledged and agreed by the undersigned that the application shall form the basis of the contract for insurance, and that any untrue or fraudulent answers, any suppression of facts, or neglect to pay the premium on or before the day it becomes due, shall and will render the policy

null and void, and forfeit all payments made thereon, unless otherwise specially provided for in the policy. Party whose life is proposed for insurance, Charles L. Knapp. Party for whose benefit the insurance is applied for, (where the application is for insurance upon the life of a husband for the benefit of his wife, the
29 former may sign for the latter. Example: Mary Jones, by John Jones,) Abby Knapp, by C. L. K. Dated at New York, this 12th day of April, 1869. Witness to the signing hereof, George Cleveland.

It is important that the agent should see that all the questions are specifically answered in order to prevent delay.

Forwarded and recommended by Geo. Cleveland, agent at New York.

The following is the finding and judgment of the court, held July 29, 1879:

LOWELL, J.:

The parties waived a trial by jury, and I have heard the case partly on a written statement agreed to by them and partly on oral testimony. I find the facts to be as follows: Charles L. Knapp and his wife, the now plaintiff, both lived in the city of New York, and the defendant corporation was established under the laws of the State of New York. The policy, which is made part of the case, was issued in New York April 14, 1869. It acknowledges the receipt of $47.40 from Abby Knapp, the plaintiff, and, in consideration of a like sum to be paid quarterly, insured the life of her husband for her benefit in the sum of $5,000. The application, which is referred to in the policy and made a part of it, declares that
30 a neglect to pay the premiums on or before the day it becomes due shall under the policy — null and void, and forfeit all payments made thereon, unless otherwise specially provided for in the policy. The policy has this clause: "This policy of insurance, after two annual premiums shall have been paid thereon, shall not be forfeited or become void by reason of the non-payment of premiums, but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the combined experience or actuaries' rate of mortality, with interest at 4% per annum. Four-fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the
31 time of the lapse of the premium, and the assumption of mortality and interest aforesaid, or at his option may receive a paid-up policy for the full amount of premiums paid: Provided, That unless this policy shall be surrendered and such paid-up policy shall be applied for within 90 days after such non-payment of premium as aforesaid, then this policy shall be void and of no effect." The policy was taken out by the husband, who signed the application in his wife's name as her attorney; the premiums were paid for

several years, most of them by the husband, though one or two by the wife. The policy seems to have been in the possession of the wife in 1871, and of the husband before and afterwards. The plaintiff lived apart from her husband nearly all [the] time after Feb., 1872. January 16, 1874, a premium became due and was not paid. Feb. 26, 1874, Charles L. Knapp
32 represented to the defendant Co. that his wife was dead, which represented they believed to be true, and he surrendered the policy, taking from the Co. $260 in money and a new policy, concerning which the only evidence was that it had been forfeited before Chas. L. Knapp's death, which happened Sept. 17, 1874. Very soon after her husband's death the plaintiff sent to the Co. for information about the policy, and her agent was told by the Co. that it was forfeited. A considerable time after this the plaintiff, being advised that she might have some rights under the policy, gave due notice and proof of loss, and brought this action more than 30 days thereafter. The net value of the policy when the non-payment occurred, if reckoned in the mode pointed out by the contract, would have been sufficient to continue it in force until a very considerable time after the day of the death of Chas. L. Knapp. This ac-
33 tion was brought to recover the full amount insured as upon a continuance of the policy under the clause above recited. Upon these facts my opinion and decision upon the law are as follows:

The fact that the husband fraudulently procured a cancellation of the policy by the misrepresentation that the plaintiff was dead was not relied on by her as a ground of recovery. I called the attention of counsel to the case of Stilwell *vs.* Mut. L. Ins. Co., 72 N. Y., 385, and asked whether that decision had any bearing upon this case. Both agreed that it had not. That decision was that by the law of New York a husband has no right to surrender a policy which is payable to his wife, and that if he does such an act she has a reasonable time after discovering to disaffirm it. But in this case there was no evidence that the unlawful act of the husband had
34 any actual effect upon the conduct of the wife by preventing a payment of premium or an election as to the kind of policy to be taken out after the failure to pay in Jan., 1874, or of any other fact connected with the cancellation of the policy which worked any estoppel on the defendants in any way unless it arises from the mere fact of cancellation; but the plaintiff did not waive any rights which the facts would give her in this respect. The only point of law argued before me was the construction of the clause of the policy already recited. Taking the whole clause together I find it to mean that the assured has an election, which must be exercised within 90 days after the failure to pay has occur-ed, to take one form or the other of a paid-up policy, and that all right ceases after the 90 days. The provision is, in substance, that there
35 shall be not an absolute forfeiture but a qualified one, and the assured shall have the right to a temporary insurance for the whole amount like that provided by statute in Mass., or a permanent insurance for a much smaller sum. Both are in fact paid-

up policies; so, though very different in other respects, and while "such paid-up policy" might seem to refer only to the lesser policy which has just been called a paid-up policy, yet when we consider the whole language, which is not that the original policy shall remain in force under these circumstances, but that the assured shall be "entitled to have it continued" according to certain calculations which the company may have reasons for requiring to be made at the time and with full understanding on both sides, and, as I have said, that the policy in either form is a paid-up policy, then
36 the promise that if the original policy shall not be surrendered, and the paid-up policy shall not be applied for within the 90 days, this policy shall be null and void, appears to cover the whole ground, and to say that the election of either and the right to either of the alternative policies is gone after the lapse of that period. The case now before me differs from that of Winchell *v.* The John Hancock Co., which I lately decided. In the policy then under consideration there was an absolute declaration that after certain premiums had been paid the policy should not be forfeited, but the assured might have a policy proportioned to the premiums paid. Then there was another absolute promise that upon non-payment of premium the policy should be void. There was no limit of time expressed, and I was asked to reconcile the two clauses by holding that the paid-up policy must be applied for before there had
37 been any failure to pay, and thus to impart a limit of time into the contract. I held that the apparent repugnance might be reconciled by taking the intent to be that the original policy should be void in all respects, excepting as saved by the proviso. In this case the whole is one connected paragraph giving alternatives, and in the same connection establishing a limitation of time. If the meaning of the contract is reasonably clear, and is not so written as to be likely to mislead the assured, a court is bound to give effect to the agreement of the parties, though it can see no very good reason why they made their contract in that way or that any great hardship would be worked by a different construction. It was admitted to be the law of New York that in respect to the payment or neglect to pay premiums a married woman stands like any
38 other person insured. Barker *v.* Union L. Ins. Co., 43 N. Y., 283. I feel bound to hold that the policy was forfeited by the neglect to pay premiums and to call for a paid-up policy.

And the plaintiff being aggrieved by the foregoing rulings, excepts thereto and prays that her exceptions may be allowed.

ABBY BALL KNAPP,
By her Att'y, SAM'L W. CLIFFORD, JR.

The foregoing exceptions are found to be conformable to the truth, and are allowed.

JOHN LOWELL,
Circuit Judge.

It is thereupon, to wit, Jan'y 9, 1880, considered by the court that

the plaintiff take nothing by her said writ, and that the said defendant recover of the said plaintiff its costs of suit, taxed at ——.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

39 The following is the opinion of the court in accordance with which judgment was entered in said cause:

Opinion of the Court.

LOWELL, J.:

The parties waived a trial by jury, and I have heard the case partly on a written statement agreed to by them and partly on oral testimony. I find the facts to be as follows: Charles L. Knapp and his wife, the now plaintiff, both lived in the city of New York, and the defendant corporation was established under the laws of the State of New York. The policy which is made a part of the case was issued in New York, April 14, 1869; it acknowledges the receipt of $47.40 from Abby Knapp, the plaintiff, and, in consideration of a like sum to be paid quarterly, issures the life of her
40 husband for her benefit in the sum of $5,000. The application which is referred to in the policy and made a part of it disclares that a neglect to pay the premium on or before the day it becomes due shall render the policy null and void, and forfeited all payments made thereon unless otherwise specially provided for in the policy. The policy has this clause: "This policy of insurance after two annual premiums shall have been paid thereon shall not be forfeited or become void by reason of the non-payment of premiums, but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit: The net value of the policy when the premium becomes due and is not paid shall be ascertained according to the combined experience or actuaries' rate of mortality, with interest at four per cent. per annum. Four-fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it
41 will insure shall be determined according to the age of the party at the time [of] the lapse of premium, and the assumption of mortality and interest aforesaid, or at his option may receive a paid-up policy for the full amount of premium paid: Provided, That unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such non-payment of premium as aforesaid, then this policy shall be void and of no effect."

The policy was taken out by the husband, who signed the application in his wife's name as her attorney; the premiums were paid for several years, most of them by the husband, though one or two by the wife. The policy seems to have been in the possession of the wife in 1871, and of the husband before and afterwards. The plaintiff lived apart from her husband nearly all the time after
42 February, 1872. January 16, 1874, a premium became due and was not paid. February 26, 1874, Charles L. Knapp repre-

sented to the defendant company that his wife was dead, which representation they believed to be true, and he surrendered the policy, taking from the company $260 in money and a new policy, concerning which the only evidence was that it had been forfeited before Charles L. Knapp's death, which happened September 17, 1874. Very soon after her husband's death, the plaintiff sent to the company for information about the policy, and her agent was told by the company that it was forfeited. A considerable time after this, the plaintiff being advised that she might have some rights under the policy, gave due notice and proof of loss, and brought this action more than thirty days thereafter. The net value of the policy when the non-payment occurred, if reckoned in the mode
43 pointed out by the contract, would have been sufficient to continue it in force until after the day of the death of Charles L. Knapp. This action was brought to recover the full amount insured as upon a continuance of the policy under the clause above recited. Upon these facts, my opinion and decision upon the law are as follows:

The fact that the husband fraudulently procured a cancellation of the policy by the misrepresentation that the plaintiff was dead was not relied on by her as a ground of recovery. I called the attention of counsel to the case of Stilwell *v.* Mut. L. Ins. Co., 72 N. Y., 385, and asked whether that decision had any bearing upon this case, but both agreed it had not. That decision was that by the law of New York a husband has no right to surrender a policy which is payable to his wife, and that if he does such an act she has a reasonable time after discovering to disaffirm it. But
44 in this case it was agreed that the unlawful act of the husband might be disregarded as having had no actual effect upon the conduct of the wife by preventing a payment of premium or an election as to the kind of policy to be taken out after the failure to pay in January, 1874; that there was nothing in the cancellation of the policy which implied an estoppel on the defendants in any way.

The only point argued was the construction of the clause of the policy already recited. Taking the whole clause together I find it to mean that the assured has an election, which must be exercised within ninety days after the failure to pay has occurred, to take one form or the other of a paid-up policy, and that all right ceases after the ninety days. The provision is, in substance, that there shall be not an absolute forfeiture, but a qualified one, and the as-
45 sured shall have the right to a temporary insurance for the whole amount like that provided by statute in Massachusetts, or a permanent insurance for a much smaller sum. Both are, in fact, paid-up policies, though so very different in other respects, and while such paid-up policy might seem to refer only to the lesser policy, which has just been called a paid-up policy, yet when we consider the whole language, which is not that the original policy shall remain in force under these circumstances, but that the assured shall be "entitled" to have it continued according to certain calculations which the company may have reasons for requiring to be made at

the time, and with full understanding on both sides, and, as I have said, that the policy in either form is a paid-up policy. Then the proviso, that if the original policy shall not be surrendered
46 and the paid-up policy shall not be applied for within the ninety days this policy shall be null and void, appears to cover the whole ground, and to say that the election of either and the right to either of the alternative policies is gone after the lapse of that period.

The case now before me differs from that of Winchell *v.* The John Hancock Co., which I lately decided. In the policy then under consideration there was an absolute declaration that after certain premiums had been paid the policy should not be forfeited, but the assured might have a policy proportioned to the premiums paid. Then there was another absolute provision, that upon non-payment of premium the policy should be void. There was no limit of time expressed, and I was asked to reconcile the two clauses by holding that the paid-up policy must be applied for before there had been any failure to pay, and thus to import a
47 limit of time into the contract. I held that the apparent repugnance might be reconciled by taking the intent to be that the original policy should be void in all respects excepting as saved by the proviso. In this case the whole is one connected paragraph giving alternatives, and the same connection establishing a limitation of time. If the meaning of the contract is reasonably clear, and is not so written as to be likely to mislead the assured, a court is bound to give effect to the agreement of the parties, though it can see no very good reason why they made their contract in that way, or that any great hardship would be worked by a different construction. It was admitted to be the law of New York that in respect to the payment or neglect to pay premiums a married woman stands like any other person insured. Barker *v.* Union L. Ins. Co., 43 N. Y., 283.

48 I feel bound to hold that the policy was forfeited by the neglect to pay premiums and to call for a paid-up policy.

Plaintiff to have six weeks to file exceptions; after that time judgment to be entered for def'ts.

49 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record in the cause of Abby Knapp *v.* The Homœopathic Mutual Life Insurance Company, lately determined in said circuit court, and of all proceedings therein, and of the opinion of the court.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-second day of September, A. D. 1882, and of the Independence of the United States the one hundred and seventh.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

50 Know all men by these presents, that we, Abby Ball Knapp, of Boston, as principal, and Mary A. Clifford and Flora A. C. Johnson, of Boston, as sureties, are held and firmly bound unto The Homœopathic Mutual Life Insurance Company, of New York city, in the full and just sum of three hundred dollars to be paid to the said Homœopathic Mutual Life Insurance Company, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated the 20th day of October, in the year of our Lord one thousand eight hundred and ——.

Whereas, lately, at a term of the circuit court of the United States within and for the district of Massachusetts, to wit, on the 9th day of January, 1880, A. D., in a suit depending in said court between said Knapp and said insurance company, judgment was rendered against the said Knapp, and the said Knapp having procured a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Homœopathic Mutual Life Insurance Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said plaintiff in error, Knapp, shall prosecute her said writ of error to effect, and answer all damages and costs, if she fail to make her plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

ABBY BALL KNAPP, [L. S.]
By her Att'y, SAM'L W. CLIFFORD, JR.
MARY A. CLIFFORD. [L. S.]
FLORA A. C. JOHNSON. [L. S.]

Signed, sealed, and delivered in presence of—
JOHN G. STETSON.

Approved.

JOHN LOWELL,
Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN. G. STETSON,
Clerk U. S. C. C, Mass. Dist.

51 *Assignment of Errors and Prayer for Reversal of Judgment.*

Supreme Court of the United States.

ABBY BALL KNAPP, Plaintiff in Error,
vs.
HOMŒ. MUT. LIFE INS. CO., Defendant in Error. } No. 441.

The plaintiff assigns the following general and specific errors:

I.

Errors as to construction of the policy.

A. The court erred in construing and deciding as it did on the facts found.

B. The court erred in giving any effect to the proviso to forfeit the policy for want of surrender, &c.; such provision was illegal and void.

C. The court erred (according to its own construction recognizing this proviso as valid) in requiring this policy to be given up and another taken out, contrary to the terms of the policy.

D. The court erred, since its construction was not that most favorable to the plaintiff, and would work injustice to her under all the facts in the case.

E. The court erred in determining the time when the 90 days for forfeiture would begin to run under this policy.

II.

Errors as to application of facts to the construction of the policy.

F. The court erred in not giving sufficient effect to the facts, *a*, that the policy was taken out as a policy to become non-forfeitable "after two annual premiums had been paid;" *b*, that it "was made solely upon the conditions therein contained and thereto annexed;"
c, and that it provided security to itself by the right "to de-
52 duct the balance of the year's premium" upon death, as being, *d*, "special provisions otherwise in the policy" in favor of the plaintiff, to relieve from forfeiture, if payments were made as often as once a year.

G. The court erred in not giving proper effect in favor of the plaintiff to the facts, *a*, that the policy was surrendered, by admission of the defendant, within 90 days from Jan'y 16th, 1874; and, *b*, a new policy was taken out secretly and by fraud; and, *c*, for part of the consideration which belonged to her; *d*, the whole consideration being sufficient to have insured beyond the death, free of forfeiture.

H. The court erred in considering with the weight it did, *a*, "that the company might have reasons for requiring calculations to be made with full understanding on both sides;" and, *b*, not sufficiently considering with it the facts of the company's secret and apparently fraudulent acts within the time when such calculations might have been made.

I. The court erred in not giving sufficient weight to the fact of the position in which the common law puts a married woman in such a case, where the defendant may be guilty of a fraudulent conspiracy with her husband to wrong her.

J. The court erred in finding for the defendant without its showing that it did some act to notify or inform the plaintiff, or to require proof of her death before proceeding to cancel the policy within the time of her right.

III.

Errors as to rulings in law.

53 K. The court erred in ruling "that if the meaning of the contract is reasonably clear, &c., a court is bound to give effect to it," and should have ruled substantially "that in a policy of life insurance for the benefit of a woman and for her to act upon the meaning should be clear beyond a reasonable doubt to the least intelligent woman before a judgment of forfeiture thereon should be given against her."

L. The court erred in not ruling "that the facts of surrender, cancellation, and other secret and unknown acts with the husband in connection with the policy within the 90 days after Jan'y 16th, 1874, estopped the defendant from setting up forfeiture by not taking out a paid-up policy, even if otherwise required, at least until 90 days after notice or knowledge of these acts came to the plaintiff" for affirmation or denial under the decision in the Stilwell case cited, and from saying that it did not in effect prevent the plaintiff by such acts.

IV.

Errors as to findings of fact.

M. The court erred in finding that the policy was surrendered or cancelled unless such surrender or cancellation are to be construed for the benefit of the plaintiff.

N. The court erred in finding that "there was no evidence that the unlawful acts of the husband had any actual effect upon the conduct of the wife by preventing a payment of premium or an election as to the kind of policy to be taken out after the failure to pay in Jan'y, 1874, or of any other fact connected with the concellation of the policy which worked any estoppel on the defendant in any way, &c.," since the acts of the defendant in dealing with the husband tended to prevent her action by defendant's keep-
54 ing secret and silent when it ought to have spoken.

V.

Errors in not finding facts.

O. The court erred and the record is incomplete for its not finding whether the defendant made any attempt to notify the plaintiff of its acts or to ascertain the truth of the husband's representations

as to her death. This error arises only on the supposition that the construction of the policy given by the court is correct.

Wherefore the plaintiff prays that the judgment of the circuit court may be reversed and the case remanded for such action as this honorable court shall consider meet upon the facts found and inferences therefrom, or for hearing as to further facts if desired.

SAMUEL W. CLIFFORD, JR.,
Att'y for Plaintiff in Error.

[Endorsed:] Sup. C't U. S. 1885, Oct'r term. Abby Ball Knapp pl'ff in error, *vs.* Homœ. Mut. Life Ins. Co., def't in error. No. 167. Assignment of error & prayer for reversal of judgment. [Stamped:] Office Supreme Court U. S. Filed Sep. 3, 1885. James H. McKenney, clerk.

Endorsed on cover: Massachusetts C. C. U. S. No. 167. Abby Ball Knapp, plaintiff in error, *vs.* The Homœopathic Mutual Life Insurance Company. Filed 9th November, 1882.

FILED
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JAMES H. McKENNEY,
CLERK.

117-411

PLAINTIFF IN ERROR'S BRIEF AND ARGUMENT.

SUPREME COURT OF THE UNITED STATES.

October Term, 1885.

No. 167.

ABBY BALL KNAPP, PLAINTIFF IN ERROR,

vs.

THE HOMŒOPATHIC MUTUAL LIFE INSURANCE COMPANY.

SUPREME COURT OF THE UNITED STATES.

October Term, 1885.

No. 167.

ABBY BALL KNAPP, PLAINTIFF IN ERROR,

vs.

HOMŒ. MUT. LIFE INS. CO.

(The references herein to page and line are to the printed record.)

STATEMENT OF THE CASE.

The plaintiff in error brings her action against the defendant, a corporation established under the laws of the State of New York, upon a contract or policy of life insurance made, on or about April 14th, 1869 in said State, by said defendant insuring the life of her husband for the sum of $5000,— and made payable on his death to her, if living, thirty days after due notice and proof of death.

The policy in full is printed with the record. (Page 4.)

The more important and unusual points of this contract on which questions have arisen in this case, are

1*st*, that, though its first statement is that the premiums are payable *monthly*, (page 4, line 10)

2*d*, in the body of the policy the *agreement* (not condition), is stated to be that they shall be paid *quarterly* during the *continuance* of the policy, (page 4, line 18)

3*d*, it is provided that upon death "the balance of *the* year's

premium" shall be deducted from the amount insured (page 4 line 30) and

4th, that "*This* policy of insurance, after two *annual* premiums shall have been paid thereon, shall *not* be *forfeited* or become void by reason of the non-payment of premium, but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit; The net value of the policy when the premium becomes due and is not paid, shall be ascertained according "to the combined experience" or "actuaries" rate of mortality with interest at four per cent. per annum. Four-fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumption of mortality and interest aforesaid, or *at his option* may receive a *paid up* policy for the *full amount of premiums paid.*"

"Provided, that unless this Policy shall be surrendered and *such paid up* policy shall be applied for within ninety-days after such non-payment of premium as aforesaid, then this policy shall be void and of no effect. (page 4, line 35.)

5th, "This policy is made and accepted upon the *conditions* herein contained and hereto annexed" (page 5, line 16) and among the conditions contained and annexed thereto (page 5, line 41) there is none requiring as a *condition* that the payments of premium be made either *monthly* or *quarterly* so as to work a forfeiture "after two annual premiums have been paid" as provided in the non-forfeiture clause above.

6th, the only references of this policy to the application in relation to conditions of forfeiture (page 4, line 14) (page 5, line 41) are concerning representations as to health and as to false statements made in the application, (which therefore called for no further examination,) since the policy provides against forfeiture for any other cause after two annual premiums paid."

7th, On the *death* of the wife during the life of the assured, the husband may substitute any other beneficiary under *this* policy. (page 4, line 32)

8th, This insurance for the benefit of the wife "*shall be paid to her* if living in conformity with the statute" (page 4, line 27) the statute, leaving no right in the husband during the life of the wife.

Facts.—The facts are that the husband deserted the plaintiff and lived separate after February 1872 (page 12, line 5), he had paid all but one or two of the quarterly premiums, which were paid by the plaintiff while living with him (page 12, line 1). The quarterly premium due January 16th, 1874 he failed to pay (page 12, line 5) and on February 26th, 1874 he fraudulently represented to the defendant that his wife was dead (page 12, line 6.) whereupon the defendant depending solely upon this representation *at once* on that day (page 12, line 8) without any inquiry into the fact, took a formal surrender of and formally cancelled the policy (as it claims) (page 12, line 25) which the law of New York forbids, (page 12, line 31) and paid the husband therefor $200 in money and a new policy for $60.70 premium paid. (page 12, line 9.)

The plaintiff was ignorant of any of these acts until about the time of her bringing this action, the company on her demand only saying that the policy was *forfeited* (page 12, line 14).

The plaintiff's husband Charles L. Knapp, died September 17th, 1874, and she then at once made the fact of death known to the defendant and made claim under the policy (page 12, line 12) being ignorant of the above mentioned facts, and was only informed by the defendant that the policy was *forfeited*, (page 12, line 14) Believing the same, she rested till further information otherwise derived, convinced her that her rights had been abused (page 12, line 15) though of the particulars still ignorant, and finding that the time which the premiums paid would continue the policy according to the above rule had not expired at the time of her husband's death, she gave due notice and proof of death (page 12, line 16) brought this action under and upon the original pol-

icy after the expiration of the required 30 days (page 12, line 16), assuming that "*it*" was in force as "*continued*" (page 12, line 21) under the above rule as much as if, instead of giving a rule which would definitely fix the time, it had on its face specified the time it should be continued. The provision for temporary insurance was like that provided in Mass. for non-feiture policies. (page 12, line 49.)

The Claims of the Plaintiff in the Court below.

1st, The Plaintiff contended before the Court below, that she had a right to consider this precise policy as non-forfeitable and all that was necessary after two annual premiums paid, unless she had previously elected and taken out *such paid up* policy as was provided in the alternative,

2d, that the defendant having declared this policy forfeited January 16th, 1874 (as witness its answer (page 7, line 23) and having acted upon that assumption in dealing with her husband, even if in error, cannot now claim, having disregarded the ninety days, that the plaintiff should have taken any other policy within ninety days,

3d, That so far as surrender could be lawfully required, (which she contested,) the defendant having taken a surrender from her husband February 26th, 1874, (page 12, line 8,) could not be permitted to say that surrender had not been seasonably made,

4th, That in so far as the defendant had acted and had not done either act which it might do in conformity with the policy, it was estopped to deny that what it had done should be construed under all the facts for the benefit of the plaintiff, as that which upon knowledge by her she should choose as most for her benefit. (Page 12, line 39).

5th, That there is doubt under the policy when for the purpose of working a forfeiture "after two annual premiums paid" the ninety days shall begin to run.

6th, That all cases of doubt are to be construed to her favor, she not having written the contract but the defendant.

The defendant's answer.

The defendant admitting other facts in its answer, sets up as a defence.

1*st*, That the *non-payment* of premium January 16th, 1874, then and thereby forfeited *this policy* and made *it* void (page 7, line 23)

2*nd*, That the policy was not in force according to the provisions for temporary insurance, or according to any provision or for any purpose whatever. (page 7, line 27).

Claims of the defendant.

1*st*, That the policy was forfeited by the non-payment January 16th, 1874, (page 7, line 23.)

2*d*, That a *new* policy must in any event be taken out within 90 days after a failure to pay one quarterly premium or all rights of the wife were forfeited, notwithstanding any of the facts found in this case.

How the questions arise.

The questions in the case arise upon the judgment of the Court below upon the facts set forth, as to the construction which should be put upon this policy under the facts and circumstances surrounding its making, and the law of the State of New York and the relations of the parties as affecting all the proceedings thereupon, and as to how these circumstances affect the defendant.

And the errors arise in and from the rulings of law by the Court being too limited and incorrect.

1*st*, In not ruling that the defendant was estopped by its own acts from claiming a forfeiture.

2*d*, In not (because of this limited ruling) giving due weight to the surrounding facts in construing the policy.

3*d*, In not ruling and construing most favorably for the plaintiff.

4*th*, In ruling that a paid up policy was required, instead of continuing the original. (page 13, line 39.) (page 12, line 45.)

The exceptions of the plaintiff in error are based upon the

judgment of the Court wherein it is set forth, (page 12, line 40) that she does not waive the benefit of any of the facts which would affect the defendant whether claimed in her argument in that Court or not.

The Plaintiff in Error's Assignments relied on and referred to in her Brief and Argument are as follows:

I.

Errors as to construction of the policy.

A. The Court erred, in construing and deciding as it did on the facts found.

B. The Court erred, in giving any effect to the proviso (page 4, last line) to forfeit the policy for want of surrender, &c; such provision was illegal and void.

C. The Court erred, (according to its own construction recognizing this proviso as valid) in requiring *this* policy to be given up and *another* taken out, contrary to the terms of the policy. (page 4, line 36.) (page 12, line 45.)

D. The Court erred, since its construction was not that *most favorable to the plaintiff*, and would work injustice to her under all the facts in the case.

E. The Court erred, in determining the time when the 90 days for forfeiture would begin to run under this policy.

II.

Errors as to application of facts to the construction of the policy.

F. The Court erred, in not giving sufficient effect to the facts;

a, that the policy was taken out as a policy to become *non-forfeitable* "after two *annual* premiums had been paid." (page 4, line 36)

b, that it "was made solely upon the *conditions therein contained* and *thereto annexed*." (page 5, line 16).

c, and that it provided security to itself by the right "to deduct the balance of the *year's* premium" upon death; (page 4, line 32) as being,

d, "special provisions otherwise in the policy" (page 11, line 1) in favor of the plaintiff to relieve from forfeiture if payments were made as often as once a year.

G. The Court erred, in not giving proper effect in favor of the plaintiff to the facts;

a, that the policy *was* surrendered by admission of the defendant (page 12, line 8) *within* 90 *days from January* 16*th*, 1874; and

b, a *new* policy was taken out secretly and by fraud (page 12, line 9) and,

c, for part of the consideration which belonged to her;

d, the whole consideration being sufficient to have insured beyond the death, free of forfeiture. (page 12, line 19).

H. The Court erred, in considering with the weight it did, (page 13, line 7)

a. "that the company might have reasons for requiring calculations to be made with full understanding on both sides" and

b, not sufficiently considering with it the facts of the company's secret and apparently fraudulent acts within the time when such calculations might have been made. (page 12).

I. The Court erred, in not giving sufficient weight to the fact of the position in which the *common law* puts a married woman in such a case, where the defendant may be guilty of a fraudulent conspiracy with her husband to wrong her.

J. The Court erred, in finding for the defendant without its showing that it did some act to notify or inform the plaintiff, or to require *proof* of her death before proceeding to *cancel* the policy within the time of her right.

III.

Errors as to ruling in law.

K. The Court erred, in ruling "that if the meaning of the contract is reasonably clear, etc.," (page 13, line 30) "a court is bound to give effect to it, etc.," and should have ruled substantially "that in a policy of life insur-

ance for the benefit of a woman and for her to act upon, the meaning should be clear beyond a *reasonable doubt to the least intelligent woman* before a judgment of *forfeiture* thereon should be given against her.

L. The Court erred, in not ruling that the facts of surrender, cancellation, and other secret and unknown acts with the husband in connection with the policy *within the* 90 *days after January 16th*, 1874, ESTOPPED the defendant from setting up forfeiture by not taking out a paid up policy, even if otherwise required, at least until 90 days after notice or knowledge of these acts came to the plaintiff " for affirmation or denial under the decision in the Stilwell case cited, and from saying that it did not *in effect* prevent the plaintiff by such acts.

IV.

Errors as to finding of fact.

M. The Court erred, in finding that the policy was surrendered or cancelled, unless such surrender or cancellation are to be construed for the benefit of the plaintiff.

N. The Court erred, in finding (page 12, line 33) that "there was *no* evidence that the unlawful acts of the husband had any actual effect upon the conduct of the wife by preventing a payment of premium or an election as to the kind of policy to be taken out after the failure to pay in January 1874, or of any other fact connected with the cancellation of the policy which worked any estoppel on the defendant in any way, etc.," since the acts of the defendant in dealing with the husband tended to prevent her action by defendant's keeping secret and silent when it ought to have spoken.

THE POINTS AND AUTHORITIES

OF THE

PLAINTIFF IN ERROR.

LEADING PROPOSITIONS OF THE PLAINTIFF IN ERROR'S ARGUMENT.

I.

That the construction of the Court below is not the only one possible, nor is it the most favorable to the plaintiff and that which should be adopted.

II.

That the *acts* of the defendant ESTOP it from setting up forfeiture, at least till after the longest time that the premiums paid would have insured according to its rule.

III.

That, under the policy, it is left *doubtful* when for the purpose of forfeiture for non-payment of premiums "after two annual premiums paid" the limit of ninety days is to begin to run, as well as whether the old policy must in any event be surrendered *and* a new policy taken out within that limit.

The attention of the Court is specially called to those cases cited herein which are marked with a star.

Argument for the Plaintiff in Error.

The action is brought on an original policy of life insurance issued under the Laws of the State of New York, which by the terms used therein was *itself*, and not by a *new* and *another* policy, to be *non-forfeitable* after payment of two *annual* premiums and to entitle the insured to *its* continuance in force for a time, *fixed* by a rule contained therein, notwithstanding *subsequent* failure of payment of premium (after the two annual premiums paid,) unless the beneficiary, a married woman, should choose to surrender the same *and*, within a limited time, take a *new* policy, therein designated as "*such*

paid up policy," (page 4, last line) payable at death, for the full amount of the premiums then paid.

The conditions upon which the policy is made and accepted are limited to those therein contained and thereto annexed. (page 5, line 16.)

The principal questions to be considered under the assignments of error, are ;

First,— Whether the construction given the non-forfeiture terms of this policy in the Court below under all the facts found, is the only one possible, and, if not, is there another construction more favorable to the plaintiff in error which from justice to her should be adopted ?

Second,—If this construction be the only one possible, what should be the effect thereon of the *unjust* and *prejudicial* acts of the defendant in relation thereto ?

Third,— Whether the ninety days limit had begun to run so as to create a forfeiture against this plaintiff, at the time when it was claimed by the defendant to have been *forfeited*, considering the matter of justice to both parties, wherein *"he only should suffer who has done wrong, where loss must fall on either ?"*

I.

As to the First Question concerning the construction of the non-forfeiture terms of the policy and the justice of the plaintiff's case, this argument will not consider the clause of the policy (page 4, line 35), beginning : "This policy, etc.," and ending "this policy shall be void and of no effect," as if it stood almost alone, as was the case in the construction by the Court below, but as connected with many other parts of this singular contract and the circumstances and general knowledge concerning non-forfeiture policies, surrounding it.

The right to have the *original* policy run beyond the time of failure to pay premiums, is found by the Court (page 12, line 50) to be "like that provided by Statute in Massachusetts,"

for the same purpose, at the time when this policy was made; and was at that time, and before any question arose on this policy, used by life insurance companies insuring in New York for the obvious purpose, as it was in the policy of the defendant company, of inducing reluctant insurers, who were constantly objecting to the forfeiture of all insurance upon accidental failures with absolute promptness to pay premiums.

* "Courts in Construing contracts should look to the *subject matter* and the *surrounding circumstances*, and avail themselves of the same light, which the parties to the contract possessed."

1 Greenlf Evi. §§ 277.286.
Broom's Maxims. * 532.
* Merriam *vs.* U. S. 107 U. S. 441.

Gen. Stats. Mass. 1861, chap. 186.

"Sec. 1. No policy of insurance on life, hereafter issued by any company chartered by the authority of this commonwealth, shall be forfeited or become void by the non-payment of premium thereon, any further then regards the right of the party insured therein *to have it continued in force* beyond a certain period, to be determined as follows, to wit: the net value of the policy, when the premium becomes due and is not paid, shall be ascertained, according to the "combined experience" or "actuaries" rate of mortality, with the interest at four per centum per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes, if given for premium, shall then be cancelled, four fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium, and the assumptions of mortality and interest aforesaid."

"Sec. 2. If the death of the party occur within the term of temporary insurance covered by the value of the policy, as determined in the previous section, and if no condition of the insurance other than the payment of premium shall have

been violated by the insured, the company shall be bound to pay the amount of the policy the same as if there had been no lapse of premium, any thing in the policy to the contrary notwithstanding: *provided however*, that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease: and *provided also*, that the company shall have the right to deduct from the amount insured in the policy the amount at six per cent. per annum of the premiums that had been forborne at the time of the death."

This policy being like the Massachusetts *non-forfeiture* policies *needed* no *new* policy to continue it till the payments made had exhausted their value in insurance, and no *technical* construction *ought* to be given to destroy the practical effect of such insurance.

* Carter *vs.* John Hancock L. Ins. Co. 127 Mass. 154.

The only difference *at the time this policy was taken* which should be considered is, that the policy in suit requires two annual premiums to have been paid to prevent forfeiture, while the Massachusetts policies and the law at that time made no such limit.

Goodwin *vs.* Mass. Mut. L. Ins. Co. 73 N. Y. 485.489.

The plaintiff, more than two annual premiums having been paid, depended and had a right to depend upon this likeness for her construction, not desiring the other privilege requiring a surrender, which she might have chosen.

One principal and important difficulty with the construction as given by the lower Court, which makes it questionable if the plaintiff could so have understood, is that the *original* policy would not "*be thereby continued in force*" as required, but that something else, a *paid up* policy, (page 12, line 45) taken out on its surrender and cancellation, would be substituted for *it*; and further, that "this policy was made and accepted solely upon the *conditions therein contained and thereto annexed*" (page 5, line 16) apparently referring most

* McMasters *vs.* Prest. &c., Ins. Co. 55 N. Y. 222.
* Rann *vs.* Home Ins. Co. 59 N. Y. 388 at foot.
* Herman *vs.* Merchts. Ins. Co. 81 N. Y. 187 at foot.
* Marvin *vs.* Stone 2 Cowen 781. 806.
Barney *vs.* Newcomb 9 Cush. 46.
* Notman *vs.* Anchor Ins. Co. 4 Jur. N. S. 714.
" " 27 L. J. C. P. 280.
" " 4 C. B. N. S. 481.

* And "if the language of a policy is capable of two interpretations, that one must be adopted which is most favorable to the assured, because the language used is that of the insurer," and should not require learning to read it.

* Ld. St. Leonard's in Anderson *vs.* Fitzgerald 4 Ho. of Lord's cases 510.
same - - 24 Eng. L. & Eq. 13.
* Cockburn C. J. in Fowkes *vs.* Man. & Lond. L. Assn. 3 B. & S. 925.
Grace *vs.* Amer. Ins. Co. 109 U. S. 282.
* Hoffman *vs.* Aetna F. Ins. Co. 32 N. Y. 405. 406. 412. 415.
Reynolds *vs.* Comm. F. Ins. Co. 47 N. Y. 597;
Barlow *vs.* Scott 24 N. Y. 40.
* Clinton *vs.* Hope Ins. Co. 45 N. Y. 464.
* Potter *vs.* Ont. & Liv. F. Ins. Co. 5 Hill. 151.
* Western Ins. Co. *vs.* Cropper 32 Penn. 351. 356.
* Merrick *vs.* Germania F. Ins. Co. 54 Penn. 277. 284 at foot.
Franklin F. Ins. Co. *vs.* Brock 57 Penn. 74.
Fitton *vs.* Accidental Death Ins. Co. 17 C. B. N. S. 122,
* Gershauser *vs.* N. Brit. M. Ins. Co. 7 Nev. 174.
Eclipse F. Ins. Co. *vs.* Schoener, 2 Cincin. 474.

In the case Boyd vs., Bunting 78, Penn. St. Rep. 219, Sharswood, J. says, "wherever a party has the power to do a thing (*statute provisions and limitations being out of the way*) and means to do it, *the* instrument he employs *shall be so construed* as to give effect to this intention."

Lant's appeal 95 Penn. St. 279. 283.
Grover *vs.* Grover 24 Pick. 263. 264.

and where afterwards a condition or limitation is attached to such an agreement tending to defeat it, such condition ought to have no effect unless it is so *clearly* expressed as to leave no room for *possible* doubt and ought not to contain as in the case at bar a provision requiring a surrender, as a condition precedent to prevent forfeiture, which the law at the time forbids, see (page 12, line 31.)

* Eadie vs. Slimmon. 26 N. Y. 915.
* Fowler vs. Butterly 53 How. Pr. R. 471.
* Whitehead vs. N. Y. L. Ins. Co. 33 Hun. (N. Y.) 425.

and certainly it ought not to be construed into a *technical trap* to defeat the general intention of the preceding words.

* Edwards vs. Travelers Ins. Co. 20 Fed. Rep. 663.
Kentucky Mut. L. Ins. Co. vs. Jenks. 5 Ind. 103 at foot.

The defendant company cannot and does not question and the Court has found (page 12, line 17) that it has had the *full consideration under this policy* which according to its terms it should have had for an insurance beyond the time of the death for the full amount insured; and as much as if it were a Massachusetts Policy or if the contract were made in that State and considering which it held out these terms to secure the insurance.

* Morris vs. Penn. L. Ins. Co. 120 Mass. 503.
* Carter vs. John Hancock Ins. Co. 127 Mass. 154. 155.

but it insists against the insured on a close *technical* construction of its own language to *forfeit* because of plaintiff's not applying for another and *new* or *paid up* policy, without her possessing knowledge which was in its exclusive possession and so kept secret, and at least contrary to the apparent meaning of the terms of the granting clause, that "the insured shall be and is after two annual premiums have been paid, entitled to the continuance of the *original* policy" which it also says "shall *not be thereafter forfeited.*" (page 4, line 35).

* Chase vs. Phoenix L. Ins. Co. 67 Me. 85.

The provision for the surrender of the old policy, if lawful, and for the taking out of such *paid up policy* "is inconsistent, with the continuance of the original policy agreed upon

"*after two annual premiums paid*;" and is only consistent with the taking out of a new policy for the full amount of the premiums paid, should plaintiff choose that alternative.

There is no construction, (except one soon to be presented continuing the alternative form and substituting "or" for "and" after the word surrender,) which disposes of all difficulties unless we leave out the *unlawful* clause requiring surrender.

Co. Litt. 42. 183.
* Shore *vs.* Wilson. 9 Clark & F. 397.
* Harrington *vs.* Kloprogee. 4 Doug. 5.
* Churchwardens of St. Saviour. 10 Rep. 67 b.
* Archibald *vs.* Thomas. 3 Cowen 284.
* Many *vs.* Beekman Iron Co. 9 Paige 188. 195.

The inquiry always is; Is there between the *limitation or condition* and the *general scope* of the *undertaking* in the policy, any inconsistency?

* Hull *vs.* N. W. Mut. L. Ins. Co. 39 Wis. 405.

If *clearly* not, no difficulty arises in finding the understanding of the parties, but some acuteness, it is said, should be brought in to uphold the general provision, notwithstanding the condition, if it is not *clear beyond reasonable question* to the insured, where she is entitled to any benefit; and the insurance company being substantially a *trustee for her* from the nature of its business, should not be favored by the law in technical defences against its *unlearned* patron whose trust it holds, but all its acts should be construed for her benefit.

* Kentucky Mut. Ins. Co. *vs.* Jenks. 5 Ind. 103 at foot.
* Fowler *vs.* Butterly 78 N. Y. 73 at top.

In the case at bar, the language used seems to have required very careful thought by the learned judge below to arrive at A meaning *possible* to the contract, which thought

could hardly have been expected of this unlearned woman unused to insurance *terms* and business, or to the *niceties and intricacies of logical discussions or legal interpretations.*

But the decision of the Court seems to be in *error* in taking this *technical* rather than *practical* turn and so being most favorable to the technical defendant and against the unlearned client, and contrary to the express trend of the decisions.

Why should this woman know any other *paid up* policy was intended except *such* as was pointed out in the policy?

In the case Winchell vs. John Hancock Mut. L. Ins. Co. 8 Repr. 550, referred to in the judgment in the case at bar, the same learned judge said very wisely that he was *compelled to decide* on his *first impression*, and laid it down as a rule "that any other construction should be *clear and decisive* before a court should adopt it." Why should not the doubt be equally effective with the same judge in the case at bar, where he is *compelled to say* that *the language in reference to taking out* SUCH PAID UP *policy* "seems to refer only to the lesser policy &c.," (page 13, line 2), when, adopting his *technical* conclusion still leaves a conflict with the law as to surrender and also with the terms of the policy which require that "*it*" and not a *new* policy shall if at all continue?

Such *new* policy would indeed have to be "*taken out*" if this construction be followed, (page 12, line 45) and not the *original* be *continued.*

* Christy *vs.* Hom. Mut. L. Ins. Co. 93 N. Y. 348.
* Chase *vs.* Phoenix L. Ins. Co. 67 Me. 85.
* Ld. St. Leonards, in Anderson *vs.* Fitzgerald, 4 Ho. of Lds. cases 510.

The term "*non-forfeiture*" is used as convertible with "*paid up*" in the policy in this same case of Winchell vs. John Hancock Mut. L. Ins. Co. 8 Ins. L. J. 652 and it would have required but little more technical reasoning in the case at bar to have ruled, the policy having already become non-forfeitable or paid up by the payment of more than two annual premiums, that, waiving the illegal require-

ment of surrender, the *paid up* policy desired by the plaintiff already existed, she not having chosen the other.

The *very purpose* and *first* and most *natural* meaning of the term *non-forfeitable* when connected with such a rule *for extension of a policy beyond the actual payment of "early premiums which are expected to pay for insurance in excess of the actual risk"* Cohen vs. N. Y. Mut. L. Ins. Co. 50 N. Y. 610 as is expressed in this policy; is to insure the beneficiary to the full value of her money already paid, by insurance under the *identical* policy without further action on her part.

* Carter *vs.* John Hancock Mut. L. Ins. Co. 127 Mass. 154. 155.

The provision of non-forfeiture in a a policy is therefore made for an equitable purpose and presumably for the benefit of the insured, the premiums paid being in their hands charged with an excepted trust for that purpose, and it should be so construed as to secure that end if possible, without obstruction by technical reasoning.

* Fowler *vs.* Butterly. 78 N. Y. 73.
* Girard *vs.* Mut. L. Ins. Co. 97 Penn. St. 26 to 29.
* Edwards *vs.* Travs. Ins. Co. 20 Fed. Repr. 663.
Bumpstead *vs.* Div. Mut. Ins. Co. 12 N. Y. 81.

The words of *this* policy are not that *the insurance shall not fail* but that "after two annual premiums are paid, *this* policy shall *not be forfeited or become void by reason* of the *non-payment of premium*," and practically and to the common understanding that "*it*" "shall" remain valid till the amount already paid in premiums has been exhausted by continued insurance thereunder, unless one certain other policy is asked for and taken out, to wit; a paid up policy for the full amount of the premiums paid.

* Carter *vs.* John Hancock L. Ins. Co. 127 Mass. 154. 155.

The provision requiring a new policy not for the original

amount $5000, but for a different and a new amount, the amount of all the premiums paid, is expressed in clear terms which admit of no doubt, not so as to temporary insurance.

* Christy *vs.* Homo. Mut. L. Ins. Co. 93 N. Y. 348,

If it be urged that the provision of the application is that the policy was to be forfeited unless the premiums were paid on or before the days agreed; the plaintiff refers to the clause therein "unless otherwise specially provided for in the Policy (page 11, line 1) "and to the special provisions of the policy as being "*non-forfeitable*," and referring to the application, *as is their common use* (page 4 line 11) (page 5, line 41), only *in reference to the representations as to age and physical condition* to prevent fraud on the company by falsehood therein, and to the following further considerations in reply.

* Moulor *vs.* Amer. L. Ins. Co. 111 U. S. 341. 342.

The policy says "that it is made and accepted only on the conditions contained and annexed" (page 5, line 16) presumably referring only to those on its face and attached at the end. (page 5, line 28).

The plaintiff, not having seen this *application* but only having had the *policy* in her hands, may have been led to believe that the application was in the usual form and contained no conditions in itself, and from these several clauses of the policy that, "after the two annual premiums had been paid, &c.," there could be no *forfeiture* for non-payment of premiums quarterly, though the *agreement* in the policy was so to pay them.

*Chase *vs.* Phœnix Life Ins. Co. 67 Me. 85.

The principal question, therefore, as presented by the bill of exceptions as allowed by the Court on the facts set forth,

(if they are sufficient for the purpose of adjudication on examination by this Court

R. S. U. S. § 700.
Scholey *vs.* Rew. 23 Wall. 331.
Graham *vs.* Bayne. 18 How. 60.
Prentice *vs.* Zane 8 How. 481.
Burr *vs.* Des. Moines Co. 1 Wall. 99.
Hecker *vs.* Fowler. 1 Black. 95.)

is, whether the plaintiff understood and was bound to understand by the terms of this contract and policy of insurance, *precisely* as the learned Court, by technical reasoning and not without some doubt, (which doubt is admitted by the Court (page 13, line 2) and by the application of a *technical* term *not so used in the policy*, but *apparently in a different sense*; "that upon failure to pay a quarterly premium upon the precise day it became due, notwithstanding "*two annual premiums had been paid*," she was bound to take out a *new policy* in any event within ninety days thereafter. (page 12, line 45.)

It would do less violence to "*its*" express terms, make it less a trap, and be more in harmony with the purpose of this *non-forfeiture* policy, giving a *choice* of "*its*" continuance, or of a "*paid up*" policy for all premiums paid, to read the conjunctive "and" by the disjunctive 'or,' so continuing the alternative choice that the clause shall read "Provided that unless this Policy shall be surrendered "*or*" such paid up policy shall be applied for within ninety days after such nonpayment of premium, as aforesaid, then this policy shall be void and of no effect." (page 4, last line.)

This would leave "*it*," "*This policy*," the original policy, in force after the surrender as provided for one case, or require a new policy to be taken out for a different purpose in the other; so that none of the terms or purposes of the policy would be violated.

To do this considering the *purpose* and the *choice* would be following a rule of construction so ancient as hardly to need citations.

Baldwin *vs.* Cocks. 1 Leon. 74.
Nichols *vs.* Tolley. 2 Vesey 388.
Richardson *vs.* Spraag. 1 P. Wms. 434.
Framingham *vs.* Brand. 1 Wils. 140.
Brownsword *vs.* Edwards. 2 Ves. Sr. 248.
Maberly *vs.* Strode. 3 Ves. 450.
Bell *vs.* Phyn. 7 Ves. b. 453.
Barker *vs.* Sureties. 2 Strange 1175.
Price *vs.* Hunt. Pollex. 645.
Englefried *vs.* Woelpart. 1 Yeates 41.
Collinson *vs.* Wright. 1 Sid. 148.
Hale *vs.* Sweet. 40 N. Y. 100.
Roome *vs.* Phillips. 24 N. Y. 469.
Maynard *vs.* Wright. 26 Beav. 285.
Carpenter *vs.* Head. 14 Pick. 453.

The plaintiff contends that the ruling of the Court, that "if the meaning of the contract is reasonably clear and is not so written as to be likely to mislead the assured &c., (page 13, line 30,) in the way the Court have *used it, by importing a technical* meaning to the term *paid up* policy (page 13, line 1,) which there is no evidence the plaintiff so understood or was informed and which would require her to adopt an expert's knowledge against the express reference, and which is inconsistant with the expression "*this* policy shall not be forfeited," but "*it*" shall be entitled to be continued in force after two annual premiums shall have been paid" (to wit: by their payment,) is so certainly *forced* against the *apparent general impression* of a *non-forfeitable* policy taken out at the time and under the circumstances this was, so like the Massachusetts policies, as described to an ordinary unskilled mind; and is unwarrantably too much in favor of the defendant holding its peculiar relation as against an unlearned plaintiff.

* Chase *vs.* Phœnix L. Ins. Co. 67 Me. 85.

The Court should have ruled substantially as in plaintiff's assignment K of errors, since the policy was *issued by a Mutual Company in some sense a trustee,* written by skilled minds and to be understood by *all classes* of men and women.

* Sheerer *vs.* Manhattan L. Ins. Co. 16 Fed. R. 722 at foot.

* National Bank *vs.* Ins. Co. 95 U. S. 678 at foot.
* Fowler *vs.* Butterly. 78 N.Y. 73.

The Court *ought not to rewrite the contract in such a manner as to help the defendant,* who, if any one, should be prejudiced by his own *reference* and *definition* of "*such paid up*" policy as is intended must be applied for and taken up.

The ambiguity arising from this reference is patent so far as the continuance of the policy is concerned and the writer should not be helped by the statement that "both are paid up policies" unless plaintiff was thereby so fairly informed.

* Ld. Mansfield in Lilly *vs.* Ewer. Dougl. 74.
*Ld. Eldon in Anderson *vs.* Pitcher. 2 Bos. & Pul. 168.
Lethulier's Case. 2 Salk. 443.
Johnstone *vs.* Osborne. 11 Ad. & El. 549.
Truman *vs.* Loder. 11 Ad. & El. 589.
Jones vs. Littledale. 6 Ad. & El. 486.
Magee *vs.* Atkinson. 2 M. & W. *440.
Stewart *vs.* Aberdein. 4 M. & W. *211.
3 Starkie Evi. *1035, *1036
* 1 Greenlf, Evi. § 277
* Broom's Maxims. *127. *468.

The *general purpose aud appearance* of the granting clause should prevail rather than be limited, when the limiting words are not "clear *beyond reasonable question.*"

* Bullen *vs.* Denning. 5 B. & C. 847:
* Jackson *vs.* Hudson. 3 Johns. 387.
* Worthington *vs.* Hylyer. 4 Mass. 205.
* Elliot *vs.* Thatcher. 2 Met. 45.
* Johnson *vs.* Jordan. 2 Met. 241.
* Broom's Legal Maxims. *414.

Relative words should be read as referring to the nearest antecedent. In the case at bar, *such* being the relative word referring to a *paid up* policy just described for the full amount of the premiums paid and is the *only* paid up policy by that title referred to in the policy at all.

* Baring *vs.* Christie. 5 East. 405.
Rex *vs.* Inhbts. of St. Marys. 1 B. & Ald. 329.

The law should not *construe against* this *express reference.*

Co. Litt. 210 a. 359 a.
* Goodall's Case. 5 Rep. 97.
* Brown's Maxims. *505.

The expression of one kind, *excludes* others of the class.

Hare *vs.* Horton. 5 B. & Ad. 715.
* Kings *vs.* Inhbts. of Sedgley. 2 B. & Ad. 65.

The maxim "*expressio unius est exclusio alterius*" ought to apply here as well as to the clause of the policy, "*this policy is made and accepted &c.,*" (page5, line 16,) and to the express reference to representations (page 4, line 14,) (page 5, line 41) which in connection with the words "*unless otherwise provided &c.,*" (page 11, line 1), a *non-forfeitable* policy having been taken out; as it would tend to the belief in an ordinary mind that all that the policy sought to guard the company against was false representations in the application, according to the usual purpose of such application.

Where *the limiting words* in a contract are the ones which *raise a doubt,* they should be avoided and omitted in construction.

* Cardigan *vs.* Armitage. 2 B. & C. 207.
* Bullen *vs.* Denning. 5 B. & C. 847.
* Jackson *vs.* Hudson. 3 Johns. 387.
Jackson *vs.* Lawrence. 11 Johns. 191.
Palmer *vs.* Warren Ins. Co. 1 Story 360.
Alderson B. in Meyer *vs.* Isaacs. 6 M. & W. 612.

It would be a fair rule that words used for the benefit of the insured in a contract of life insurance of this kind, should be held to mean anything claimed by the beneficiary which can by any possible construction be supposed to have been

understood by her, especially when she is unlearned and there is no evidence of her knowledge of a different meaning held by the writer and communicated to her at the time of writing to estop her.

* Jackson *vs.* Blodgett. 16 Johns. 172, 178.

In the case at bar, on the contrary, there was a knowledge of a *different existing meaning of non-forfeiture* as applied to life insurance policies, *as in the Massachusetts plan of non-forfeiture insurance*, then in existence and claiming attention and patronage, and the Court has found (page 12, line 50,) and the statute and cases already cited show that the rule and provisions are like this.

Further, the form and meaning of the form of policy at bar has met with condemnation and doubt, in construction by the Courts of its own State.

* Christy *vs.* Homœ. Mut. L. Ins. Co. 93 N. Y. 348.

Applying the rule to the case at bar, the fullest effect must be given to the word *non-forfeitable* in a mutual policy according to the common understanding of an ordinary woman such as the plaintiff in her position in life, the wife of a travelling salesman who was but little at home to advise her; unless it is limited by the *clearest* and most *uniquivocal* words of *limitation*, and such as could not be open to any doubt by such a person.

* Girard *vs.* Mut. L. Ins. Co. 97 Penn. St. 26 to 29.

To such an uninstructed mind, unacquainted with the *technical* use as applied by the Court exclusively for the benefit of the learned insurer and writer,

* Kentucky Mut. L. Ins. Co. vs. Jenks. 5 Ind. 103 at foot.

the term non-forfeitable would convey the impression, under the facts, that what had been paid, above the value of the risk and the actual cost of the insurance, by the payments which were made, should not be lost, but that the insured should *by* THAT PRECISE POLICY *have the full benefit and value in insurance of all the payments so long as they should last,*

* Carter *vs.* John Hancock L. Ins. Co. 127 Mass. 154.155.

(such payments being a consideration exacted in advance to insure the full amount, according to the decision and statement of that fact taken judicial notice of in

* Cohen *vs.* N. Y. Mut. L. Ins. Co. 50 N. Y. 510.

that "*early annual premiums are expected to pay for insurance in excess of the actual risk*" being paid towards a reserve and other funds,)
or, that, by the terms of the policy she might have back her entire premiums through a *paid up* and *new* and another kind of policy, merely losing the interest thereon during the life of the assured, *if* she took out *such new* and therein denominated *paid up* policy for this *new* and distinct amount, to wit, the sum of all the premiums paid.

* Christy *vs.* Homo. Mut. L. Ins. Co. 93 N. Y. 347.

A *new* policy would not be *necessary* or appear so to be, when the amount of insurance was to *continue* the same ($5000,) and the only limit was to be the time which payments already made would insure; determinable by a rule *which is and must be certain beyond doubt.* This rule does not require questionable calculations as suggested by the Court below (page 13, line 6,) otherwise it could not avail the company for whom the Court asserts it, as the longest limit would be given the plaintiff who can claim no more.

Further, the argument "*ab inconvenienti*" will apply in favor of the plaintiff, as the defendant may always know its position, because the failure to take the option within ninety days by the plaintiff will forfeit her right thereto unless, as in this case, the company have forfeited their right to object by attempted and claimed cancellation and forfeiture through fraud during the limited time, *by claiming a forfeiture as on the day of failure to pay premium.*

Notwithstanding this, the Company *who have received the full consideration for the insurance claimed* (page 12, line 17,) and have a right to deduct the balance of the year's premium (page 4 line 30) make a defence which is purely technical and unjust, independent of the fraud, and the clause which they rely on *requires a judical construction*, baced upon *technical knowledge outside the contract* as to what was understood as the *paid up* policy referred to, which *by the terms of the policy* is misleading.

If the claim of the defendant is sustained, it can only be through such forced construction in its favor.

* Edwards *vs.* Trav. Ins. Co. 20 Fed. R. 663.

It may not be a question as to "hardship to the defendant or to the plaintiff, or of the reason why the agreement is made," as the Court observe, (page 13, line 33.)

(see Carter *vs.* John Hancock Ins. Co. 127 Mass. 155.)

but, it certainly is a question whether the plaintiff for whose benefit the defendant assumed to be writing, is bound to have understood such *a narrow sense*, or may have understood it according to any construction as claimed by her, or in any other more favorable way.

If the terms used are so *clear* that the plaintiff *could* understand them in but *one* way, in consideration of their meaning to every one taking a policy however *unlearned* in the subject matter, and are not *technical or unlawful*, the plaintiff must

be bound, unless there has been a waiver, or such action on the part of the defendant as to *estop* it from setting up the forfeiture.

But, *as far as technical terms* are used, as in the case of the words *paid up* policy, the defendant *cannot avoid its own definition* when referring to "*such*" paid up policy, (page 4, line 48.)

Coke Litt: 210 a.
Goodall's Case. 5 Rep. 97.
Hare *vs.* Horton. 5 B. & Ad. 715.
King *vs.* Inhbts. of Sedg. 2 B. & Ad. 65.

If any doubt exists, it cannot be removed by making something else a *paid up* policy which is not referred to as "*such*" unless, for the purpose of letting the *original continue*, the effect thereof shall be, after surrender, *rather than to encourage a forfeiture*, to let the *original* then remain as *the* paid up policy for the time fixed, in the absence of the choice of the one specifically referred to as "*such*,"

(* see Potter *vs.* Ont. & Liv. Ins. Co. 5 Hill 151.)

the *original* being thus by the act of the husband in the hands of the defendant secretly under a *claim of surrender* (page 12, line 8) which cannot operate under the laws of the State of New York to the injury of the wife *till she has with full knowledge* ratified it.

* Dutcher *vs.* Brooklyn L. Ins. Co. 3 Dill. 95.
* Pilcher *vs.* N. Y. L. Ins. Co. 33 La. Ann. 322.332.
* Union Mut. L. Ins. Co. *vs.* Stevens. 19 Fed. R. 674 at foot.
* Whitehead *vs.* N. Y. L. Ins. Co. 33 Hun. (N.Y.) 425.
* Rothschild *vs.* Amer. Cent. Ins. Co. 74 Mo. 41.
* Chase *vs.* Phoe. L. Ins. Co. 67 Me. 92.
* Stillwell *vs.* Mut. L. Ins. Co. 72 N. Y. 385.
* R. S. N. Y. 3 Banks 7th Ed. page 2339

Act of 1870, chap. 277 as amended by 1873, chap. 821 provides the only way in which surrender previously entirely forbidden, might have been made binding on the plaintiff at the time when the defendant claims this policy was surrendered and cancelled prior to the time limited for forfeiture as contended for.

The statute is as follows :—

"Any policy in favor of a married woman, or of her and her children, or assigned in her, or in her and their favor, on written request of said married woman, duly acknowledged before a commissioner of deeds, or other officer authorized to take acknowledgements of deeds, in the same manner as required by law, to pass her dower right in lands of her husband, and on the written request of the policy holder may be surrendered to and purchased by the company issuing the same in the same manner as any other policy."

"And such married woman may, in case she have no child or children born of her body, or any issue of any child or children born of her body, dispose of such policy in and by a last will and testament, or by deed duly executed and acknowledged before an officer authorized to take acknowledgements of deeds, in the same manner as required by law to pass her dower right in lands of her husband, which disposition lawfully made shall invest the person or persons to whom such policy shall have been so bequeathed, or granted and conveyed, with the same rights in respect thereto as such married woman would have had in case she survived the person on whose life such policy was issued, and such legatee or grantee shall have the same right to dispose of such policy as herein conferred on such married woman."

Though the policy provides (page 4, line 32) (for whatever the provision is worth), that "in case of the decease of the wife during the lifetime of the assured, the said assured may at his option *substitute any other beneficiary* under this policy" it also provides (page 4, line 27) for the payment of the insurance *in conformity with the law* to the wife, for her sole use, if living, and if not living to her children or their guardian, unless there had been such substituted beneficiary, thus com-

ing within the terms of the above statutes subsequently made for her protection.

Now there was no substituted beneficiary, as this policy provided the company, instead of seeking for a disposition of the wife's interest such as, if dead, she might have made under the above statutes, or for the guardian of her children or for her executor or administrator; accepted a delivery into its hands by the holder of the policy without any of the formalities required by the law, and claim a surrender, cancellation and forfeiture thereof and as a consideration of, or part of, the value thereof issue a *new* policy to the husband in the ignorance of the plaintiff, which also without her knowledge he permits to lapse, having also received money from the defendant, *through its carelessness* to say the least, to which he was in no sense entitled.

The construction therefore above contended for by the plaintiff giving her the benefit of this delivery of the policy into its hand within 90 days as a surrender provided for, and considering that it did what it ought to have done and what she would have claimed, to wit; the continuance thereof for temporary insurance, would be consistent with every term in the policy and would leave "*it*," the *original* policy, giving her the benefit of every doubt, *continued* for such time as the rule would allow. This certainly is equivalent to the surrender which the defendant is estopped to dispute (page 12, line 8) and which it contends was required by the terms of the policy, but which, notwithstanding, *except for the purpose of assisting her rights*, the plaintiff contends is only necessary where the express *paid up* policy therein defined, for the full amount of the premiums paid, is desired to be taken out.

The construction of this contract made for the benefit of plaintiff by the defendent ought to be such as most surely to accomplish *its purpose* in the *most natural way*, unless its terms are *clearly* and *unambiguously* limited; and they are to be *construed* most *strongly against* the company and most *favorably towards* the other party and so as to have effect rather than to fail, and not to encourage a forfeiture.

* Young *vs.* Mut. L. Ins. Co. 2 Sawyer. 325.
* Hull *vs.* N. W. Mut. L. Ins. Co. 39 Wis. 405.
* Hoffman *vs.* Ætna Ins. Co. 32 N. Y. 406.
* Barney *vs.* Newcomb. 9 Cush. 46.
* Rolker *vs.* Gt. West. Ins. Co. 4 Abbt. Decis. 76.
* Reynolds *vs.* Comm. Ins. Co. 47 N. Y. 597.
* Rann *vs.* Home Ins. Co. 59 N. Y. 388.
* McMasters *vs.* Prest. &c., Ins. Co. 55 N. Y. 222.
* Herman *vs.* Merchts. Ins. Co. 81 N. Y. 187 at foot.
* Worthington *vs.* Hylyer. 4 Mass. 205.

The rule for construing the *non-forfeiture* agreement written by the defendant *for the plaintiff's benefit*, though the language be that of the usual form of the company, is not, as the Court below appear to have thought, to find what the *defendant probably* meant, in the *absence of evidence of a meeting of minds as to that meaning*, and so to determine the question, but it should also be considered in the absence of such evidence, whether the language used is so *clear, definite, unequivocal* and *unambiguous* as to leave *no other* meaning *possible* to the mind of a woman unused to the business or the law, upon such reading as she would give thereto, and such as *not to need* a *careful consideration* and study of a *learned judge*, who in giving *his* construction is obliged *in his doubt* to *import* the term *paid up* policy from outside the contract, so far at least as its application to continued insurance is concerned, and apply it thereto in opposition to what *at first, seems* to be its only use in the policy. (page 13, line 2.)

* Herman *vs.* Merchts. In. Co. 81 N. Y. 187 at foot.

The plaintiff says, and believes the Court ought to rule, that this *non-forfeiture feature* was added to policies with *the evident intent to lead insurers to believe* rather that the *specific policy and insurance* was *not to be lost till the expiration of the time which was fixed by the rule therein laid down,*

* Chase *vs.* Ph. L. Ins. Co. 67 Me. 90.

unless the insured *preferred* another way which was left to *her option.*

(* see Potter *vs.* Ont. & L. Ins. Co. 5 Hill 151.
* Miller *vs.* Green. 8 Bing. 106.)

by the terms therein just subsequently written, of surrendering the original policy and taking a *paid up* policy for the full amount of the premiums paid, which must, if at all be done within the ninety days limit,

* Christy *vs.* Homœ. M. L. Ins. Co. 93 N. Y. 347.

because this is the only *paid up* policy which is referred to as "*such*" in the policy and is the only thing without the importation of an *insurance expert's* knowledge as to the meaning of a *paid up* policy or rather, what is known by them as a *paid up* policy.

In no place is there any indication to the mind of an ordinary woman unacquainted naturally with the subject of *Life Insurance* or *Paid Up* Policies, that a distinct and *new* policy must be taken out (page 12, line 45), to preserve a right given in these terms in a *non-forfeitable* policy "*to have* THIS *policy continued in force.*"

Besides this, the Court say (page 12, line 50), that this was to be like the Massachusetts *non-forfeitable* policies *a well-known form* and way of insurance, which, by the Statutes of that State already set forth at length,

Genl. Stats. Mass. 1861 chap. 186.

are not to have anything done but are entitled to be continued to the limit of the value of the premiums already paid,

* Carter *vs.* John Hancock Ins. Co. 127 Mass. 154.

and the only difference *clearly* shown to be given by the policy in suit, is that the insured under this has an option to to take out on surrender a *paid up* policy, promising to pay at death all that has been paid as premium, so that nothing but the interest would be lost.

*Christy *vs.* Homœ. M. L. Ins. Co. 93 N. Y. 348.

Whether this *choice is to be taken* would be *clearly known by the insurer* and *binding on the insured at the expiration of the ninety days,* otherwise the *non-forfeiture* clause should have the natural effect of avoiding forfeiture by continuance of the policy without *any injury* to the insurer, who has received the *full consideration* and may deduct the balance of a year's premiums. (page 4, line 30),

* Girard *vs.* Mut. L. Ins. Co. 97 Penn. St. 27.
* Carter *vs.* John Hancock Ins. Co. 127 Mass. 155.

This likeness to Massachusetts non-forfeitable policies, *then well-known* and meeting with favor and *referred to* as a fact by the Court has more than a passing importance and weight as determining the meaning which might be assumed by the plaintiff to pertain to this contract, as to whether a *new* and *different* policy must be taken out. (page 12, line 45).

* Merriam *vs.* U. S. 107 U. S. 441.
Goodwin *vs.* Mass. Mut L. Ins. Co. 73 N. Y. 485.

In the case of **CHRISTY vs. HOMŒ. MUT. L. INS. CO.** 93 N. Y., 348, the Supreme Court of Appeals of New York, the State where this company was organized and did its business and where these parties resided at the time this contract was made, had occasion to examine the same clause in this indentical form of policy issued by the same defendant and said, p. 348 "*It is not easy to determine what the insurer intended by the provision as it was framed*" "but there can be no doubt about the construction of the agreement to pay back by *paid up* policy all premiums paid, after two annual premiums have been made," and the learned judge who decided the case at bar is compelled to admit a like doubt, saying (page 13, line 2,) "and while SUCH PAID UP *policy* might SEEM to refer only to the lesser policy which has just been called a *paid up* policy" and then proceeds to *argue for the defendant* that it does not say in the precise words that the "original" policy shall be continued, forgetting that "*this*" policy and "*it*" said in that connection, can by the ordinary

use of language only mean the "original." (page 12 line 45.)

But has not the defendant given us an idea of the value it attached to the original by *secretly buying its possession* from the husband for cancellation within the time now claimed to have been allowed before forfeiture could occur, for a sum of money which would have continued it in force beyond his death; and does not this practically afford us the *construction of the defendant at that time*, that as between it and the plaintiff, it considered that it was *not* bound to await that time and of course that the plaintiff was not bound to act within that time at least under the changed conditions by the defendant's act as delay could do no greater harm to the defendant, and its act tended to avoid its right to forfeit, if such ever existed.

* Lovell *vs.* St. Louis Mut. L. Ins. Co. 111 U. S. 272 at foot.
* Ins. Co. *vs.* Norton 96 U. S. 234.
* Johnson *vs.* So. Mut. L. Ins. Co. 79 Kentucky 403.

The Court, further in this connection also remark that the company might wish to make calculations. If this argues anything it argues too much, for if the rules of calculation were not so *precisely* stated as to be certain, it would be too late then to correct them and the insured would be entitled to the longest possible time, if such defect did not have the effect to insure in any event till death.

Whatever may have been the wish in this respect, of the defendant, we need not argue, since the case finds that the "*premiums already paid were sufficient* TO CONTINUE THE POLICY *far beyond the time of the* DEATH OF THE HUSBAND" (page 12, line 17) and if a new policy were issued to her husband as stated (page 12, line 9), so far as the plaintiff is concerned, it *could not* be forfeited within this time.

* Baltimore Mut. L. Ins. Co. *vs.* Bratt. 55 Md. 200. 211.212.
* Pilcher *vs.* N. Y. L. Ins. Co. 33 La. Ann. 322. 332.
* Carter *vs.* John Hancock Ins. Co. 127 Mass. 154.

The Court below are compelled to say that the construction

should be such "as shows a *full understanding* on *both* sides" in reference to this rule for calculation. (page 13, line 8.) Of such there is no evidence in the cese, except the terms used in the policy and the reference to this temporary insurance under the Massachusetts Statutes, and the company would certainly have had no right at such calculation to add anything at the time, and took no measures to find the assured so that such understanding or calculations could be made, but, on the contrary, took part in acts which *tended to prevent any claim or calculation on the part of the wife.*

It is true that the policy, as the Court say, does not use the precise word, "*the* ORIGINAL *policy shall remain in force*" (page 13, line 4), but the plaintiff is sufficiently unlearned, not to be able to distinguish between "*this* policy" (page 4, line 35), and "the original policy" when "*it*" is to be continued (page 4, line 38), and can see no reason why from its language, to carry out its purpose, "*it*" should not be construed for her benefit.

The policy does not say anything very clearly

* Christy *vs.* Homœ. Mut. L. Ins. Co. 93 N. Y. 348.

certainly not to the contrary, and it says nothing *more clearly* than that the assured is entitled, whenever the circumstance of non-payment occurs after two annual payments have been made, to have "*it*," referring to "THIS *policy*" which can be nothing other than *the original* policy, "*continued in force*," not by force of something else to be done which is *clearly* and *definitely* set forth, as in reference to the option given,

* Christy *vs.* Homœ. Mut. L. Ins. Co. 93 N. Y. 348.

but set forth, if at all, in a clause *at a distance therefrom*, in *such* language that the learned judge has to import the term *paid up* policy to apply to this *temporary insurance* different from what is therein referred to as "*such paid up* policy" and applying seemingly to the lesser policy as the Court says. (page 13, line 2). And this is not all, for the Court are obliged to go further to sustain this view, and to require the

giving up of "*this*" and the "*taking out*" of *another* and *different* policy against the apparent effect of the non-forfeiture language first used, and against the Massachusetts form to which it is likened by the Court and by the Company in obtaining the contract. (page 12, line 45).

This Massachusetts form not requiring such giving up and taking out another, but the old being *retained* by the *assured* and continuing *effective* till the expiration of the time as a full insurance without further cost.

Genl. Stats. Mass. Chap. 186 of 1861.
Goodwin *vs.* Mass. Mut. L. Ins. Co. 73 N. Y. 485.
Wheeler *vs.* Conn. Mut. L. Ins. 82 N. Y. 543.
* Merriam *vs.* U. S. 107 U. S. 441.
* Carter *vs.* John Hancock Mut. Ins. Co. 127 Mass. 154.

Wherefore, *all the consideration* having been paid, all the above requirements would be practically unnecessary, tending to the inconvenience and *confusion* of the insurers, to no real benefit, and not to be encouraged against the plaintiff.

If any surrender *were* lawfully necessary, for the purpose of doing *justice* by the plaintiff, who of course at the time may be assumed not to have known of the dealings, which were not, certainly upon the case presented, brought to her notice by the defendant; the giving up by her husband and the acceptance by the company, *estops* the defendant to deny that surrender was made, and the plaintiff is ready and so stands by her suit, to accept the *benefit* of any act which has been done, if for her *advantage* and is not and cannot be bound otherwise.

* Chase *vs.* Ph. L. Ins. Co. 67 Me. 85.

She only *complains* of *those acts* done by the *defendant* in *secret with he husband* which *would tend to injure* her, especially the *cancellation* in violation of the terms of the policy (page 4, line 32), which prohibits the husband's action till her death, and then only provides for substituting in the *same*

policy a new beneficiary, which is also furthered by the Statutes of New York in force thereon, (cited p. 30, Argument.)

Stat. N. Y. 1870 chap. 277 3 Banks R. S. N. Y. 7 Ed. p. 2339.

and asks that the acts of the defendant *assuming* them to have been done *for her benefit*, in her *absence*, shall be *construed to her benefit*.

And this suggestion of the *Acts of the Defendant* brings us to the *Second* head of this argument.

II.

IF THE CONSTRUCTION OF THE CONTRACT IN THE COURT BELOW BE CORRECT; WHAT OUGHT TO BE THE EFFECT THEREON, OF THE SEVERAL ACTS OF THE DEFENDANT IN RELATION THERETO, and considering them, *is the defendant's claim just?*

"Where one of two innocent persons must suffer by the misconduct of a third person, that party shall suffer, who by his own acts and conduct, has enabled such third person, by *giving him credit* to practice a fraud or imposition upon the other party."

* Story on Agency. §§ 56.264.
Paley on Agency by Lloyd 3 Ed. 201.
* Baring *vs.* Corrie. 2 B. & Ald. 142.
Hazard *vs.* Treadwell. 1 Str. R. 506.
Campbell *vs.* Hillman. 15 B. Mon. 515.
Ramsay *vs.* Jones. 19 Reporter 694 at foot.

The plaintiff in the Court below argued nothing but the construction of one clause in the policy, but "*did not waive* (page 12, line 40), *any effects or rights which the facts would give her*" bearing upon the case, whether claimed at the argument or not, if the law of the case Stillwell *vs.* Mut. L. Ins. Co. 72 N. Y., 385 could assist her. This sentence was inserted in the bill of exceptions by the Court at the request of the plaintiff, to avoid conclusions in this Court against her, because she had not specificially relied upon these matters in the argument below.

These acts of the husband with the defendant, particularly those fraudulently procuring a cancellation by misrepresentations (page 12, line 7), were a fraud on the plaintiff which the defendant has helped, and are of no effect to injure her or in the least to impair her rights.

*Whitehead *vs.* N. Y. Life Ins. Co. 33 Hun. (N.Y.) 425.
*Rothschild *vs.* Amer. Cent. Ins. Co. 74 Mo. 41.

When the company dealt with him *within the time* when, a *paid up* policy for the full amount of the premiums, as "*such paid up policy*" might have been applied for if desired by the plaintiff according to the plain terms of the policy,

*Christy *vs.* Homœ. Mut. L. Ins. Co. 93 N. Y. 348.

it *acted in fraud of her* and as a *waiver of the necessity* of the plaintiff's demand within that time, and their loss by their unusual and unprovided cancellation and payment, growing out of at least their *gross negligence*, must be their own, and they cannot complain.

The amount of money paid the husband through this fraud which the defenant had no right to pay, would have continued the policy in force beyond the death of the husband, (page 12, line 17), and in law must be considered as still in the possession of the company unearned and justly subject to such purpose as the plaintiff may choose. Indeed part of it was used by the husband in taking out a new policy. (page 12, line 9).

It was doing an act which, however secret and unknown was reprehensible in the extreme, and *tended* to *interfere* by concealment with the plaintiff's rights, if its present claim of the meaning of the contract be correct.

As far as the intention of the defendant was concerned, it was quite as wrong to try to *interpose* the obstacle of cancellation *secretly*, as to refuse to do as might have been requested, if called upon within 90 days.

It *practically* by that act before forfeiture had accrued *intended* and *acted* to deny the rights of the plaintiff, and appears as if planning by secresy to have the time pass, the plaintiff being ignorant of any default of payment which the defendant knew, and it acted adversely, without attempting to inform her, but acting if possible against her interest.

When the plaintiff applied to the company according to her understanding of the contract and as required by the Massachusetts form which this was intended to imitate, after the death of her husband, in due season as appears (page 12, line 11), she is informed that the policy is *forfeited* and *nothing more*, being still ignorant of its fraudulent action and still further fraud of concealment.

Unquestioning, she, woman-like, turns away thinking they are doing right, *and trusting them.*

By the finding of the Court, (page 12, line 15), her *notice and proof of death were duly made and the action was not commenced till more than* 30 *days thereafter*, so that, if not forfeited as claimed by the company, so far as the record is concerned, she is entitled to her judgment.

Since the defendant now claims that the plaintiff had rights *within the time when it acted*; its own acts being in *entire disregard* of those rights and *of the clause* which gave them to her, *unless the new policy taken out on the surrender be considered the continuance provided for, which, from the premiums paid* (*page* 12, *line* 17), *could not have been forfeited at the death,*

* Girard *vs.* Mut. L. Ins. Co. 97 Penn. 26 to 29.
* Pilcher *vs.* N. Y. L. Ins. Co. 33 La. Am. 322 332.

the plaintiff claims that by *its own acts, so far from the defendant's claiming a benefit by them, it then and thereby waived this limit of time, if otherwise existing, and is* ESTOPPED *to set up, in its defence of failure of the plaintiff to assert such rights.*

Goodwin *vs.* Mass. Mut. L. Ins. Co. 73 N. Y. 491 at top.

And this, on the clearest principles of justice, *because of its concealed dealings with the husband.*

The plaintiff, though not relying upon her husband's fraud, claims all benefits which accrue from the defendant's participation in his wrongful acts.

Though the Court have stated that the case of Stillwell *vs.* Mut. Life Ins. Co. 72 N. Y., 385, was not *specially* claimed to have any bearing upon the case for the purpose of the hearing below on the question as there argued, yet it appears that the admission for that purpose, grew out of the fact in this case, that all the dealings of the *defendant* in February 1874 with the husband, were in the plaintiff's ignorance thereof and in fraud of her (page 12, line 14, 34), and so could not and should not have affected her in any aspect *except for her benefit*, and this case shows that she has disaffirmed every act of her husband to her prejudice as soon as informed thereof.

All she was ever told by the company was that the policy was forfeited. (page 12, line 14).

In the case referred to, *the company had notified the plaintiff* (thought there was no more a requirement in the policy to do so than in this case), of the surrender of the husband which was disaffirmed by the wife within one month after notice, which time was held to be reasonable within the law.

When *that* policy was *made* the law permitted a surrender by the wife and so would and did permit of a ratification of one made in her behalf.

At the time when *this* policy was *made*, it was an unlawful and void agreement for surrender which was provided in it, and for that reason all which in the policy requires surrender on her part, is to be read as if it were not inserted.

* Fowler *vs.* Butterly. 78 N. Y. 68.

If it were necessary for the plaintiff in the case at bar to do the several acts as claimed by the defendant, still she claims that as the acts of her husband and the *defendant* were both not merely *unauthorized* by her but *unlawful* by the *Statutes and law cited* and by the *terms* of the policy, she may *if for her benefit*, and does *so far as it was necessary, claim the benefit* of the *surrender* made, and does not thereby ratify the cancellation *unprovided for in the policy*, being ignorant thereof.

* Story on Agency §§ 79. 165.
* Fowler *vs.* Butterly. 78 N. Y., 68.
* North River Bank *vs.* Aymar. 3 Hill R. 262.
* Nixon *vs.* Hyserott. 5 Johns. R. 58.
* Batty *vs.* Carswell. 2 Johns. R. 48.

She is entitled to the benefit of the *law* of the Stillwell case, so far as it applies to the facts, to wit; — that "the authority to make the contract does not authorize its *cancellation* or *surrender*," at least, when that were not allowed by law at the time of making "and she can disaffirm what is not for her benefit and claim *all that is beneficial*," especially where the unlawful act of the defendant as against her has intervened.

The plaintiff therefore in this case claims that according to the construction *most in her favor* which should be followed, the *non-forfeiture* clause shall at least have effect when surrender, if that be necessary, has been made within ninety days after failure to pay the last premium due, unless within that time she shall have exercised her option and taken out the other form of policy, therein called "*such paid up policy*," upon her demand, or the company by its acts have waived its right to insist upon that limit.

Her husband had no *implied* authority and certainly none *expressed*, to surrender *for any other purpose*, and his act must accomplish one or the other benefit to her.

* Rothchild *vs.* Amer. Cent. Ins. Co. 74 Mo. 41.

The fact that the defendant *assumed wrongfully or with-*

out legal right to cancel this contract and issue another policy for a part of the value thereof, within the time when the plaintiff could apply in this manner, so far as it is concerned, *estops* it to say that what might have been done by the plaintiff had not been done, to secure her such privilege as she chose prior to such cancellation;

*1 Greenlf Ev. §§ 14, 15, 22, 38, 204, 207.
*Lamb *vs.* Clark. 5 Pick. 193. 197.
*Lovell *vs.* St. Louis M. Ins. Co. 111 U. S. 272 at foot.
*Ins. Co. *vs.* Norton. 96 U. S. 234.
*Johnson *vs.* So. Mut. L. Ins. Co. 79 Ky. 403.

and she was at liberty thereby at the time of the death to exercise her rights as upon the "*continued old policy*" as a *paid up* policy, uncancelled and in force, not having taken the other option.

The company had no right under the terms of this policy and usages, and by the law and in equity, *to take this surrender* without securing to the plaintiff one of the *privileges provided on surrender*, and it ought to be estopped by its acts from setting up forfeiture by not taking out a paid up policy, till ninety days after knowledge of these acts came to the plaintiff, for her affirmation or denial, which knowledge does not appear till the hearing of this cause.

*Story on Agency. § 96.
Paley on Agency by Lloyd. 3. 4. 5. 9. 10. 46. 47.
*Fowler *vs.* Butterly. 78 N. Y. 68.

The Court state (page 12, line 34), that "there was no evidence that the unlawful act of the husband had any actual effect upon the conduct of the wife by preventing a payment of premium or an election as to the kind of policy to be taken out etc.," but the policy was cancelled in fact, if not in law, by the company within the time, and there could be no direct evidence of the kind suggested, *only* for the reason, *that the plaintiff was ignorant and kept ignorant by the defendant of what had been done, and was and had been liv-*

ing separate from him, which ought to have put the defendant on its guard; (page 12, line 4), but it appears (page 12, line 15), that, as soon as she was informed that her policy could not be forfeited, she commenced this suit, even before she knew of these actions and of course within the time when by the decision in the Stillwell case she could lawfully repudiate them, and so did if necessary, by her action repudiate them, as the defendant must have known she would have done, if informed of them.

There was no effort on the part of the defendant to find if she *was* dead as represented by the husband, but the defendant, believing this without any further inquiry, (page 12, line 8), contrary to the usual course of insurance companies of requiring proofs of such death and contrary to all prudence, within the ninety days, *taking its own risk and making no effort to save the plaintiff or her rights*, notwithstanding its trust, *acts if possible hostile to her*, saying whether ignorantly or fraudulently, "here is the policy in our hands; the husband will not dare to let his wife know, if she is living, what has been done as they are living apart and hostile; and we will take the risk of paying a small amount to him, giving him another policy in all being less than its value, and keeping silence *till the expiration of ninety days*, will then say that the policy is forfeited *by the ninety days limit*."

*Comth *vs.* Jeffries. 7 Allen 566 at foot.

The defendant's acts, though unknown to the plaintiff, show its gross negligence, *equivalent to fraud*, and, being within ninety days of the default, rather than to be upheld to her injury should be construed for the plaintiff's advantage, as much as if plaintiff had applied for continuance within the time, and it had done all that it could do for the plaintiff, or as if it had falsely informed her that the policy was continued.

* Broom's Maxims. *209. 221. 222.

The plaintiff claims that every act of the defendent where

it has assumed to act in her absence concerning a matter where it is under obligation to her, should be construed to accomplish the best purpose for her, otherwise it will accomplish a wrong and fraud on her, where it has acted without her assent, express or implied.

The law does not imply any assent except upon full knowledge by the party assumed to assent, but will allow the party to claim all the benefit that can be derived from an act of another.

*Miller *vs.* Green. 8 Bing. 106.

In the case at bar, cancellation of the old policy which the defendant had no power to cancel, ought to be construed as an act done which it had a right and had stipulated to do and that, the most favorable to the assured, to wit: — "*its*" continuance for temporary insurance, merely terminating it as a policy upon which premiums could continue to be paid according to its original terms.

*Pilcher *vs.* N. Y. L. Ins. Co. 33 La. Ann. 322. 332.
*Union Mut. L. Ins. Co. *vs.* Stevens, 19 Fed. R. 674 at foot.
Chapin *vs.* Fellows. 36 Conn. 132.
*Lemon *vs.* Phœnix Mut. L. Ins. Co. 38 Conn. 294.

This is what the plaintiff was at least entitled to on *surrender* if not otherwise, according to the non-forfeiture provision, after two annual premiums paid; the other right to have a "*new* policy for the full amount of the premiums paid" *clearly* required a *definite and well expressed and understood selection.*

*Christy *vs.* Homœ. M. L. Ins. Co. 93 N. Y. 348.

Since she can never be said to have ratified anything she did not know, she ought to have the old policy *continued in force by their act* only for this purpose, and not absolutely annulled, since when a party acts, the law will construe their act to accomplish only that which they *ought* and had right to have done,

*Rothschild *vs.* Amer. Cent. Ins. Co. 74 Mo. 41.

and the defendant is and should *be estopped* to deny that, by its action and acts, the original policy was thus kept in force as long as the payments made would insure for the benefit of the plaintiff *if living*, whether by virtue of the surrender made or not, *all having been done by that act, according to their own construction, except to make the choice which the defendant participating in a fraud gave no notice to give the plaintiff her opportunity to make.*

Instead of this construction or any other favoring the innocent plaintiff, the Court below have held that the defendant might with impunity, before the expiration of the time which it assumes was and should have been given and left to the plaintiff, *without a particle of change in the relations*, in *disregard* of her rights and *treating them as if non-existing*, act *against her* and *against the provision in the policy made for her benefit*, if living, by *cancelling the same* and issuing a new policy with another *beneficiary.*

*Pilcher *vs.* N. Y. L. Ins. Co. 33 La. Ann. 322. 332.
*State Ins. Co. of Mo. *vs.* Todd. 83 Penn. St. 272. 278 at foot.
*Ins. Co. *vs.* Wilkinson. 13 Wallace 222. 233.
*Underwood *vs.* Farmers Joint St. 57 N. Y. 500.
*Girard *vs.* Mut. L. Ins. Co. 97 Penn. St. 26 to 29.
*Edwards *vs.* Trav. Ins. Co. 20 Fed. R. 663.

The defendant is and should be *estopped* from saying, in the *absence of proof of knowledge of the plaintiff of the acts of the defendant*, that the plaintiff *would not* have acted differently if knowing them, and so the defendant cannot and the Court ought not, to infer that she *was not* by these *secret, grossly negligent, fraudulent and unusual* acts, *prevented by the defendant*; wherefore the affirmative may be presumed against the defendant because of its secret, negligent and fraudulent acts.

*Shaw C. J. in Farwell *vs.* Smith. 12 Pick. 88.
Cooke *vs.* Ludlow. 5 B. & P. 119.

Where acts are fraudulent or are *concealed or* show *gross misconduct*, the law implies a design to mislead.

Newell *vs.* Randall. 32 Minn. 171.

There is no claim that, on the death, which occurred within seven months of the unlawful acts of the defendant when the plaintiff first met the defendant, or at any time, that the defendant ever informed or sought to inform the plaintiff of the cause of the forfeiture, but merely, that when claim was made, it said "that it was forfeited," *without a statement of the particulars, to give her the opportunity to affirm or deny*, and she appears to have been surprised.

Her *affirmance* cannot be asserted, since the whole claim of the defendant rests in a mere *belief*, in the death, when its entire action must stand or fall, not on *belief*, but solely on the *fact* of plaintiff's life or death.

Further, there is *no evidence* that the plaintiff *knew of*, and, therefore, she cannot be said to have been *remiss* in not *disaffirming* her husband's acts and claiming a benefit within the reasonable time, allowed by the case of Stillwell; much less could she be said to have *ratified* what there is *no evidence she knew*, even if as a *married woman* she could be said to ratify at all by silence. Even if the defendant had notified the plaintiff as above suggested, there is no well settled law that she would be bound to act, as the Court says in the case,

Bragg *vs.* B. & W. R. R. 9 Allen 62.

"There is no reason why it should be held that, where there is *no fraudulent act* or *contrivance*, nor *express fraud meditated* or *promoted*, (on the part of the plaintiff) a party whose property has been wrongfully dealt with in his absence, should lose his right to indemnity because he has failed to notify *a party to the wrong* that his rights were violated."

There seems therefore some reason for saying that the defendant *before* claiming a *benefit and relief* through its act should, therefore, at least have set up and proven that the plaintiff knew thereof, as was done in the case of Stillwell *vs.* Mut. L. Ins. Co.

* "*Where a fact affecting the rights of parties is known to the one, and not to the other, it is the duty of the one knowing it to give notice thereof to the other,*"

*Shaw, C. J. in Farwell *vs.* Smith. 12 Pick. 88.
Cooke *vs.* Ludlow. 5 B. & P. 119.

and especially ought this to apply in a case of life insurance like the present, where the default as to payment and the acts of the husband were unknown to the plaintiff and known and acted upon by the defendant adversely to her, without any attempt to inform her, (page 12, line 8), and the payment of annual premiums under *mutual non-forfeiture* policies being in excess of the cost of insurance for the earlier years,

*Cohen *vs.* N. Y. Mut. L. Ins. Co. 50 N. Y. 610.
Sands *vs.* N. Y. Mut. L. Ins. Co. 50 N. Y. 626.

a *quasi trust* arises under them from these payments, that the assured shall have the full benefit in some form for all his money paid.

*Fowler *vs.* Butterly. 78 N. Y. 73.
*Girard *vs.* Mut. L. Ins. Co. 97 Penn. St. 26 to 29.

This being their real purpose and intent to an ordinary understanding, a *duty* devolved on the defendant of *additional force* to *notify or attempt to notify* the *beneficiary* under their policy, before *attempting to determine either of her rights*, and at the time of her husband's death, Sept. 17th, 1874, one of these in a just sense, considering this violation of duty and trust, not having been *properly determined*, she should be entitled to rely upon it and to recover in this action, *the defendant having acted* with *gross negligence and misconduct as if there were no right on her part, and ignoring and concealing the same within the time which they* NOW *claim she should have acted.*

It does not appear but that, if the defendant had not *suffered itself to be so easily deceived for its* THEN *apparent benefit, but had insisted upon* PROPER *proof from the husband of the death of the wife, then* known to be living separate from him, or *had communicated with the wife or her friends*, or *those referred to in the application*, or *made some effort where she last lived to discover if she were alive*, as is

well known to be customary, *the husband would have been compelled to get her assent at the time* or *she would thereby have been furnished with the means of knowledge and action.*

To deal thus *secretly* with her husband while *her right* still *remained*, the plaintiff believes to have been *a breach of duty of the defendant*, as above set forth, and as much of *a fraud on her and an estoppel on the defendant*, as if the defendant had erroneously, even through misinformation, admitted that the premiums had been duly paid by the husband and then attempted to set up facts to the contrary.

The *defendant had all the knowledge of the default and these hostile and fraudulent dealings* and *kept it between itself and the husband*, and having acted in such a way with him living apart from her as would *induce it to conceal their acts* from the plaintiff, its *gross negligence* and *misconduct* would amount to *constructive if not actual fraud* towards her.

*Story Eq. Juris. §§ 258. 259. 222 to 229, 240.
*Goodwin *vs.* Mass. Mut. L. Ins. Co. 73 N. Y. 491 at top.

The defendant, by such *unusual, inconsistent, improper* and *fraudulent* cancellation of the policy *within the ninety days*, has *forfeited its right* to claim its *present* construction, admitted by the Court below subject to the revision of this Court on the facts (page 12, line 40), that *the plaintiff* was limited to *and so was entitled to only that time* in which to choose between a continuance of the original policy for temporary insurance and taking out a paid up policy for the full amount of the premiums paid.

*Chase *vs.* Phœnix L. Ins. Co. 67 Me. 85.
*Goode *vs.* Harrison. 5 B. & Ald. 147. 152. 157. 158.
Fitts *vs.* Hall. 9 N. H. 441,
*Johnson *vs.* So. Mut. L. Ins. Co. 79 Ky. 403.

The effect of these acts upon the construction were not waived and the Court merely considered what *unconnected with them* was the construction of words of the policy to which the argument was addressed (page 12, line 41), and

saves to the plaintiff the effect of the acts, (page 12, line 40), without making any decision thereon.

Wherefore, the plaintiff says that having unimpeachable and incontestable rights *at the time of these hostile acts,* the defendant ought, having been a party thereto, to be *estopped* to say that the effect of its act in formally cancelling the policy, was anything more than to prevent its continuance as a valid policy without default, and to reestablish it, as an original policy provided for, to be continued as a *paid up* policy for temporary insurance, even *if the construction as given the words in the Court below be correct.*

*Union Mut. L. Ins. Co. *vs.* Stevens. 19 Fed. Rep. 674 at foot.
*Broom's Maxims. *209.

As already observed, it is out of the fact of want of notice by the company and knowledge on the part of the respective plaintiffs, that arises the difference between the case at bar and the Stillwell case, referred to by the Court below.

In the case at bar, as soon as the plaintiff was informed (page 12, line 15), that the policy was not forfeited, she brought her action *which developes the assumed surrender and cancellation,* which she of course repudiates within the privilege of that case, and should not (if otherwise necessary) be now sent out of Court to unnecessarily demand a paid up policy on which to bring a suit, but rather upon the original as unforfeited and continued because of these acts of the defendent.

It is because of ignorance by the plaintiff of the *concealed acts of the defendant with her husband within the ninety days time,* now claimed by the defendant to have exhausted her privilege, (which action must be known by the defendant to have been adverse to the plaintiff *if alive* according to their claim) ; that she did not approach the defendant, (even if she remembered the terms of the policy particularly, it being in the defendant's possession and better knowledge), or have that opportunity to put to use these several facts unknown to her but known to the defendant and which *it was thus using to its apparent advantage and in fraud of her.*

*Johnson *vs.* So. Mut. L. Ins. 79. Ky. 403.

She might (if knowing them), have used them to the injury of the defendant, or what was better and *what the law will assume she would have done*, to her benefit, by doing what the company should then declare to be necessary to accomplish her best interest, *to which declaration and construction she could then safely submit.*

It is by this, *she* is now claimed by the defendant to be prejudiced; that the defendant was doing with her husband through *concealment and secresy an unlawful act*, which *she certainly would have repudiated if known to her and possessing the knowledge of the construction now put upon the contract* by the defendant, whatever choice otherwise she would have made.

It would seem to have been the defendant's duty in the relation it held to her

*Farwell *vs.* Smith. 12 Pick. 88.
Cooke *vs.* Ludlow. 5 B. & P. 119.
*Fowler *vs.* Butterly. 78 N. Y. 73.

though no such express requirement be contained in the policy more than in the Stillwell case, when it had such circumstances to warn it of the interest of the husband to deceive; *to have made some attempt to fathom the truth of his statement and notify the plaintiff if alive.*

The defendant must have known the law of New York

*Eadie *vs.* Slimmon. 26 N. Y. 9.
*Barry *vs.* Eq. Life Ass. Socty. 59 N. Y. 592.

at the time the policy was made, that a *surrender* of a policy made payable to a wife cannot be made, and that by subsequent statute it can only be made by a formal instrument.

R. S. N. Y. 3 Banks 7th Ed. p. 2339. (Argument p. 30.)

The provision therefore in the policy requiring a surrender if such be claimed as binding, was illegal at the time it was

made, and might therefore and should be considered as if not made therein, unless their act in taking it shall be construed for the purpose of giving her the best possible privilege under the policy.

*Chase *vs.* Phœnix L. Ins. Co. 67 Me. 85.

Since, by the decision in the Stillwell case, the plaintiff was held entitled to *a reasonable time after knowledge of surrender by the husband in her lifetime* to disavow his acts and claim her rights, and this secret dealing with the husband without attempt at notice by the defendant in the case at bar; why may not that reasonable time be considered to be extended by these fraudulent acts till such acts are brought to the plaintiff's knowledge?

This claim is made on the general principle of the cases, which hold that the Statute of Limitations concerning actions which arise from frauds, does not begin to run till the knowledge of the fraud comes to the plaintiff.

*Bailey *vs.* Weir. 12 Bankcy Reg. 24,
Carr *vs.* Hilton. 1 Curt. 230. 238.
Pritchard *vs.* Chandler. 2 Curt. 488.

This knowledge on her part does not appear to have been before her notice and proof of death and her bringing her action on *this* policy which she thereby elects "*to have been continued in force*" instead of *cancelled.*

The defendant having taken a surrender and acted upon it in her absence and without her authority, and *not having issued the paid up policy for the full amount of premiums nor done any other act contracted for in the policy*, are *estopped* to say that, that act which it could not otherwise by law do, was not *such* as she upon knowledge of the surrender would authorize and have authorized if present, and are estopped *to say that the policy was not continued by whatever name it be called as provided for her on surrender*, unless *the other choice of a different paid up policy be proven to have been made by the plaintiff.*

*Miller *vs* Green. 8 Bingham 106.

Because, whoever assumes to act concerning another's rights without their assent and in that other's absence, especially if against the law which to be effective against that other requires a special and formal assent, and where, as in this case, practically the relation of *trustee* and *cestui que trust* exists, is and ought to be assumed in law to have acted for what was *in the power of the actor* for the other's best interest, to be determined by that other party upon knowledge of the act.

*Story on Agency. §§ 79. 96. 165,
Paley on Agency by Lloyd. 3. 4. 5. 9. 10. 46. 47.
* 1 Greenlf. Evi. §§ 14. 15. 22. 38. 204. 207.
Shep. Touch. 83.
*Miller *vs.* Green. 8 Bing. 106.
*Girard *vs.* Mut. L. Ins. C. 97 Penn. St. 27.
Heyward's Case. 2 Rep. 35 b.
*Jackson *vs.* Hudson. 3 Johns. 387.
*Jackson *vs.* Blodgett. 16. Johns. 172. 178.

Waiver or estoppel may be by acts as well as by express words, as in

*Whitehead *vs.* N. Y. L. Ins. Co. 33 Hun. (N.Y.)425.

The defendant has acted secretly *as if the limit of ninety days for the plaintiff's benefit*, according to its own present contest for construction, *did not exist* or *did not apply to her case at the time of its action, which is the precise point the plaintiff claims*, and having done so; *shall it be permitted now to avail itself of its secret act and so perpetrate a fraud?*

*Whitehead *vs.* N. Y. L. Ins. Co. 33 Hun. 425.
*Lovell *vs.* St. Louis Mut. L. Ins. Co. 111 U. S. 272 at foot.
*Young *vs.* Mut. Ins. Co. 2 Sawyer. 325. 330.
*Tindall, C. J. Doe. d. Pearson *vs.* Kies 8 Bing. 181.

The great injury thereby to the plaintiff to raise a consideration for the waiver or estoppel, consists principally and sufficiently, in the light of its present defence, in *its failure of duty to her in thus dealing secretly with her husband in*

violation of the law and its trust, and the other and express terms of the policy; whether such failure arises from its gross negligence or guilty participation in his fraud,

This ought to be enough to prevent its raising a plea of forfeiture which the law does not encourage or intend to help against her, especially in these cases of life insurance by non-forfeiture policies.

Goode *vs.* Harrison. 5 B. & Ald. 147. 152. 157. 158.
Fitts. *vs.* Hall. 9 N. H. 441.
*Kentucky Mut. L. Ins. Co. *vs.* Jenks. 5 Ind. 103 at foot.
*Morse *vs.* Buffalo F. & M. Ins. Co. 30 Wis. 539. 540.
*Weir *vs.* Simmons. 55. Wis. 643.
*Clinton *vs.* Hope Ins. Co. 45 N. Y. 464.
*Hoffman *vs.* Ætna In. Co. 32 N. Y. 405.

It is practically admitted (page 13, line 39), by the decision of this case in the Court below, which did not consider these acts of the defendant, but merely the failure of the plaintiff to demand a paid up policy within 90 days, that unless this policy was *forfeited* by the plaintiff's failure to take out such *policy* within ninety days from the 16th day of January, 1874, (however contrary to the clause "THIS *policy* shall not be forfeited etc.,") (page 4, line 35), she is entitled to recover herein.

*Goodwin *vs.* Mass. Mut. L. Ins. Co. 73 N. Y. 491 at top.

By the facts appearing by the statement of the court upon which its decision is based, it does not appear that the plaintiff ever read or was informed of the terms of the policy or that they were *ever explained to her by anyone to mean what is now claimed by the defendant.*

Though the plaintiff does not claim that she is not bound by the contract for this reason, she does claim under the circumstances of the defendant's peculiar dealings with her husband, that in the absence of such fact of explanation and information communicated to her, she should not be bound to this construction, unless the terms are so *clear, plain and*

unambiguous, that she *could* not fail to understand it EXACTLY as the Court below have so unfavorably ruled in construing it, seeming merely to consider facts favoring the defendant and adverse to the plaintiff.

Although it is stated (page 13, line 35), that "the *law* of New York makes no *special* protection of a married woman as to payment of premiums," yet the *common law* as well as Equity considering their well known incapacity for business, favors *all women* and requires those dealing and making contracts with a woman, infant or otherwise weak person, or *acting* in such a way as to *affect their rights*, to *exercise greater caution to avoid questions of doubt and misunderstanding in order to bind them*, and that the terms used shall be such as BEYOND REASONABLE DOUBT, CANNOT *be misunderstood by them, unless on proof that they were duly explained to them.*

*Story Eq. Juris. § 234.

It appears, only, in regard to the plaintiff's knowledge of this contract and policy (page 12, line 2), that she at one time in the year 1871 had the *policy* and nothing more in her possession, and that she made some of the payments of premium herself, the others being supposed to have been paid by her husband, she having no other connection with it or with the defendant, till after his death.

It was taken out by her husband when living amicably with the plaintiff for her and her children's benefit, by a form of application prescribed by the company and only referred to in the policy (page 4, line 14), (page 5, line 42), as it related to *representations* therein, and when finally settling with the defendant, he must have been seen to be *acting so as to excite suspicion* of his hostility to her if living, and *against any possibly living children* concerning whom, no report appears to have been made to the defendant.

If true, that she were dead, and not considering the claims of children, it ought to have further excited its suspicion, that the husband was acting so much against his own interest, if honest, by his taking $260 when it would have been compelled to give a *paid up* policy if required for $900.60 payable

at his death, the present value of which would have been much more than $260, or else to continue the policy for temporary insurance for the full amount.

If the wife were dead as alleged by him, and the children also were dead, and *not without*, under the statutes, he might by the terms of the policy have had it made payable to whom he chose, and without payment of any premium for a considerable time, at least three years, whereas by the new policy he took, he would have to begin at once to pay premiums.

*Johnson *vs.* So. Mut. L. Ins, Co. 79 Ky. 403.

These singular acts, not authorized by the policy, done in secret between the husband and the defendant, present further the appearance that the husband, having separated from his wife in 1872, conceives the purpose of defrauding her of her rights under the policy, and within the ninety days time, when the wife's right should have been kept open to her on defendant's present claim, we find the defendant innocently *or otherwise* participating in and assisting the fraud, without notice to the wife, or attempt to notify her, or requiring proof of her death or of the death of her children, beneficiaries, and when the wife, after the death of her husband, consults the defendant, she is told, not that the policy has been *surrendered and cancelled because that would be illegal, and would give her the opportunity to repudiate,*

*Stillwell *vs.* N. Y. Life Ins. 72 N. Y. 385,

but that it is forfeited, concealing the rest.

*Newell *vs.* Randall. 32 Minn. 171.
Goodwin *vs.* Mass. Mut. L. Ins. Co. 73 N. Y. 491 at top.
*Whitehead *vs.* N. Y. L. Ins. Co. 33 Hun. 425.
*Chase *vs.* Phœnix L. Ins. Co. 67 Me. 85.

This information, erroneous or not, *she believed* and *trusted to the defended as the truth and all the truth,* till informed that there is a question of its truth, when she at once begins her action.

This *peculiar* and *unprovided* action between the husband and the defendant, further appears as if the defendant had *shown the husband a way of getting rid of his wife's right in the policy by secrecy*, through his failing to pay premium without her knowledge, by taking out a new policy to whomsoever he would, upon *a gain to the defendant of the difference between* $900.60 *and the interest and the* $260, paid him, in money and a new policy (page 12, line 9), of which, as appears by the indorsement on the policy February 26th, 1874, $200, was in cash and the balance in a new policy.

*Johnson *vs.* So. Mut. L. Ins. Co. 79 Ky. 403.

If these actions can be sustained, a broad door will be opened for such frauds against public policy and the law, which has heretofore done all it could to protect married women against such imposition, and which is opposed to all forfeitures of life insurance.

*Young *vs.* Mut. L. Ins. Co. 2 Sawyer 330.

Thus we find the one who *might have explained* this policy to her, who had it in his possession, dealing in *mutual* concealment from her with the defendant, *the only other one having a duty in the permises*, in a way to forfeit her rights, *if the claim of the defendant be allowed.*

The defendant must have seen enough to incite it to extra caution to determine the truth as to the wife's death, and the existence of children, in which events alone by law (page 4, line 27), and the terms of the policy (page 4, line 32), could it deal with him.

Nothing was done by them which might have aroused or informed her, to the guarding of her rights.

It cannot be assumed by the defendant that the plaintiff knew of their dealings, because the company *believed her to be dead*, as the facts find, and upon that alone claim to have acted; nor, if living, can they assume that she *abandoned* the policy *against her every interest* as *surrendered* and *can-*

celled, and since these could only be done under the Statutes, *upon due knowledge and by very formal and solemn written acts* ; but rather, it should be assumed that *she chose,* in the absence of positive evidence to the contrary, what was most beneficial to her, "*to continue* THIS *policy in force*" *for its full* amount for temporary insurance, *not having elected the other alternative.*

*Girard *vs.* Mut. L. Ins. Co. 97 Penn. St. 27.
Carter *vs.* John Hancock Ins. Co. 127 Mass. 154. 155.
*Miller *vs.* Green. 8 Bing. 106.

The law will not consider that she willingly and without consideration to her abandoned all her rights, and the defendant was bound to consider that the *husband* had no right to *surrender* under the law and the policy, except *for one of the purposes provided therein* and not for *cancellation.*

When dealing with a woman's or infant's or other weak or incapacitated person's property, especially in their absence and holding a position as trustee, that is, and should be construed by the Court as done, which may be done by the party trustee, acting most favorably to their interests.

*Story Eq. Juris. §§ 222 to 229, 240, 1352. 1356.
Story Partnership. § 7.
*Girard *vs.* Mut. L. Ins. Co. 97 Penn. St. 27.
*Parsons, C. J. Baker *vs.* Lovett. 6 Mass. 80.
*Danl. Ch. Pl. 4th, Amer. Ed. 1871, p. 1188.

Can a trustee determine his trust for a wife in the manner claimed by the defendant, within the time limiting the trust without notice ?

The acts of the plaintiff as affecting the question of forfeiture are very few.

She was falsely informed that the policy was forfeited and in the absence of any other information, than probably that the premiums were not paid as agreed, took that from the defendant as all and the whole truth and sought to investi-

gate that which it cannot be imagined the defendant would be very free to communicate, and all the knowledge rested with it and its agents.

All in the policy which, in the limited time it was in her posession, she would be expected to notice would be that it was *non-forfeitable*, made apparently so for her benefit, and purported to contain within itself all provisions for forfeiture (page 5, line 16), and a rule to determine its extent of insurance beyond the last payment of premium, like that provided by the laws of Massachusetts.

She would not be supposed to have studied very closely a clause, which is to say the least of *doubtful meaning*, and used in close connection with a provision for some other privilege, and which required in the Court below a *forced construction* upon a *technical insurance* term, not so used in the policy, to see, if by any POSSIBILITY OR SYSTEM OF SYLLOGISTIC REASONING, the general and accustomed purpose of this non-forfeiture policy was limited against the first impression of "such" words.

As soon as she becomes aware of the deception or unintentional falsehood of the company, her action begins and from that time, there can be no question of her purpose, by giving "due notice and proof of death" (page 12, line 15), and being now before this Court in the prosecution of her cause.

All objection as to the time of giving this notice and beginning her action is now and thus disposed of, and is not questioned in the decision, which was entirely upon the construction, and the facts set forth and the inferences therefrom if sufficient.

Goodwin *vs.* Mass. Mut L. Ins. Co. 73 N. Y. 480.
*Brink *vs.* Hanover F. Ins. Co. 80 N. Y. 108.
Grattan *vs.* Met. L. Ins. Co. 80 N. Y. 281.

If by reason of any of the acts or neglect of the defendant, or otherwise, this policy was not *forfeited* at the time when the defendant claimed and informed the plaintiff, and would otherwise have required the plaintiff *on knowledge of the de-*

fendant's acts to demand a paid up policy and to repudiate all hostile acts under the decision,

Stillwell *vs.* N. Y. L. Ins. Co. 72 N. Y. 385.

yet such knowledge, not coming to her till after the death of her husband, she may then without demanding or taking a paid up policy bring action on the original policy, since such formal acts would be unnecessary to the purposes of the law, which it would not require.

III.

The *Third* and present part of this argument is to consider,

WHEN, FOR THE PURPOSES OF FORFEITURE, IF AT ALL, IN RELATION TO THIS POLICY MADE NON-FORFEITABLE "AFTER TWO ANNUAL PREMIUMS HAVE BEEN PAID" THE NINETY DAYS LIMIT IS TO BEGIN TO RUN?

This question is not, as would appear on a cursory glance, as easy to be answered as might be wished, independent of the law already referred to, "that a wrong doer is estopped to allege his own wrong to let in the Statute of Limitations" or any other forfeiture,

*Lamb *vs.* Clark. 5 Pick. 193.

or of the other principle applied in Bankruptcy cases, "that where there has been no negligence or laches on the part of the plaintiff, in coming to the knowledge of the fraud which is the foundation of the suit, and *when the fraud has been concealed or is of such a character as to conceal itself*, the

statute (or limitation of time) does not begin to run until the fraud is discovered by, or becomes known to, the party suing."

*Bailey *vs.* Weir. 12 B. R. 24.
Carr *vs.* Hilton. 1 Curt. 230.
Pritchard *vs.* Chandler. 2 Curt. 488.

Unless "*it*" has been *properly surrendered* and *cancelled*, which cannot lawfully be,

*Cole *vs.* Knickerbocker L. Ins. Co. 63 How. Prac. 442.
*Pitcher *vs.* N. Y. L. Ins. Co. 33 La. Ann. 322.

there is another and peculiar characteristic of this singular policy, which is so *contrary* in many of its particulars to all known policies as to be a *subject of curiosity to life insurance men* and a matter of remark by the highest Court of the State in which the Company was organized and did its business,

*Christy *vs.* Homœ. Mut. L. Ins. Co. 93 N. Y. 348.

and this characteristic will bear some consideration under this head of the argument.

For the purpose of *forfeiture* for *non*-payment of premiums only, it provides, that the payments are to be made once a year, or "annual payments" which are so spoken of (page 4, line 30), (page 4, line 35).

From the clause in the policy "This policy is made and accepted upon the *conditions herein contained* and hereto annexed" (page 5 line 16), it appears to exclude all other conditions, except such as are therein expressed as conditions.

*Chase *vs.* Phœ. L. Ins. Co. 67 Me. 92.

It is true, there is an *agreement* on the face of the policy to pay quarterly (page 4, line 18), but it is no where made *a condition* in the policy *if* and "*after two annual premiums have been paid*," whatever it might have been before, that failure

to pay *quarterly* premiums after that, shall forfeit the policy; on the contrary, it is provided that in case of death within any year, *the amount already paid being sufficient security to the company*, it "agrees to pay the amount of said insurance at their office in the City of New York to the said wife, for her sole use, if living, in conformity with the *Statute* and if etc.," "*the balance of* THE *years premium, if any, being first deducted therefrom.*" (page 4, line 30),

*Girard *vs.* Mut. Ins. Co. 97 Penn. St. 27.
*Carter *vs.* John Hancock L. Ins. 127 Mass. 154. 155.

It will be noticed particularly that this is not the balance of the *quarterly* premiums for the year, showing that it thus provides an *extra non-forfeiture security*; practically meaning when taken as a whole, that "after two year's premiums have been paid," if premiums not more than for one year are in arrears, the company secures itself, by deducting the balance of the year's premium already begun, from the amount to be paid on death within that year according to the face of the policy, thus running it along, "after two year's premiums have been paid," as a *non-forfeiture* policy, year by year, and so providing the insured against loss.

If it does not mean exactly this, this interpretation in favor of the insured is just as clear as any other, as it is certainly very difficult otherwise to understand what this clause means, unless this be its meaning when taking in connection with the language in reference to *non-forfeiture* (page 4, line 35), to wit, "*this* policy of insurance after two *annual* premiums shall have been paid thereon, *shall not* be *forfeited* or *become* void by reason of *non-payment* of premium."

Now, though the time when the *annual* premiums shall be paid to prevent forfeiture is not fixed in absolute terms, it may fairly be assumed that not more than one year's premium shall be in arrears before the ninety days limit for choice, if necessary on failure should begin to run, and one year's premiums were certainly not in arrears under this policy at the time of the death" and two year's payments and more (nearly five years) had been made.

The plaintiff claims that, whatever uncertainty there is (if at all) as to the time in the year when the annual premium should be paid, which would seem to be at farthest, at the end of the policy year, this uncertainty is not her fault, any more than any other doubt in the policy.

The clause giving the right to deduct a whole year's premium from the $5000, in the absence of definite and clear *conditions* on the face of the policy (page 5, line 16), is certainly for the benefit of the defendant, and sufficient for its protection, and if the year had just begun, it would result in its deducting without having earned it, something in the near neighborhood of $189.60 from the sum to be paid at death.

If it is a possible construction, or the language is so vague that the plaintiff, a woman, *may have been confused by it into a belief*, that it was only by a failure to pay for one year, to wit, one year in arrears, being required to work a forfeiture and call upon her then, (if at all required within ninety days to make some choice, which she denies as before to be necessary unless she desired the lesser policy), and the death happening Sept. 17th, 1874, within one year of the last payment of premium, Oct. 16th, 1873; the plaintiff's notice and claim of loss being found to have been duly made, the company must pay and ought to have paid her on demand, at the death, after 30 days the amount of the policy according to its terms less $142.20 the balance of *the* year's premiums since the last payment, up to and including the time of the death.

The only provision for forfeiture in the policy *according to its terms* (page 5, line 16), was by any misrepresentation in the application.

(*see Moulor *vs.* Amer. Ins. Co. 111 U. S. 341. 342.)

This was manifestly only for the purpose of avoiding the perpetration of a fraud on the defendant by false representations as to health etc., and was so made a part of the policy and *therein* referred to (page 4, line 14), (page 5, line 41), in such a manner as to remove apprehension as to any other

purpose of reference, after the insertion of the non-forfeiture clause.

*Chase *vs.* Phœnix L. Ins. Co. 67 Me. 85.

To make quarterly payments a condition precedent, and so to forfeit for non-payment thereof, language *in the policy itself* like that in Howell *vs.* Knickerbocker L. Ins. Co., 44 N. Y., 276 is and was customary *and required, to make the meaning clear*, and *unquestionably* and to *any mind* expresses that intent. The language there used was,

"And it is hereby agreed that this policy may be continued in force from time to time until the decease of the said George R. Howell, provided that the said assured shall duly pay or cause to be paid to the said company annually, on or before the 15th day of July, in each and every year, the sum of one hundred and thirty eight $\frac{88}{100}$ dollars."

Even in this case the Court seized upon circumstances less favorable then those in the case at bar, for the purpose of accomplishing *the beneficial end of the insurance, and against forfeiture* found for the assured by a majority opinion.

By the construction of the policy at bar which is presented under this third head of argument thereon, its peculiar language shall have a useful effect towards its beneficiary, and such construction *cannot harm* the company, which is *alone at fault for its obscurity*, whose laws and rules for the consideration which it had received in premiums, would have contained this policy except, under the present contention of the defendant, *for this technical objection of failure on the party of the plaintiff to accurately understand her rights and claim them in form*, through her ignorance of facts known only to, and concealed by the defendant.

The defendant, as the case finds, has received upon the policy $901.20 and interest, though it may in its own wrong have paid out $260.

The above argument is not affected by the fact set forth that the application stipulated "that a neglect to pay premium on or before the day it becomes due, shall render the

policy *null and void* and *forfeit all payments* thereon *unless otherwise specially provided for in the policy.*"

(see policy page 5, line 16)

Thus providing in a singular way, not for *forfeiture of the policy*, but of the premiums, and attempting contrary to common usage to make *null and void* one instrument by another made prior thereto and by condition subsequent, which is not favored by by the law and the Statutes of the State where the contract is made.

*Eadie *vs.* Slimmon. 26 N. Y. 9.
*Sands *vs.* N. Y. L. Ins. Co. 50 N. Y. 626.
*Cohen *vs.* N. Y. L. Ins. Co. 50 N. Y. 610.
Stillwell *vs.* Mut. L. Ins. Co. 72 N. Y. 385.
*Whitehead *vs.* N. Y. L. Ins. Co. 33 Hun. 425.

And besides this there *is a special provision* in the policy for *non-forfeiture* (page 4, line 35), which seems to meet this requirement of the application, and to dispose of the question of forfeiture and annulling of the policy, when two annual premiums had been paid.

This being the form of defendant's policy which was taken out (to wit, *non-forfeiture*), the plaintiff may *reasonably* by the use of this form of policy and the provision (page 5, line 16), that she was only bound by the conditions therein expressed, have been so misled to believe that this provision of the *application*, which does not refer to a *non-forfeiture policy*, if otherwise effective, was thus disposed of.

If there is any *uncertainty* that arises by putting such *unusual conditions* in such a *separate instrument*, referred to in the policy *not* as containing *conditions as to payments of premium* but only as to *representations* made to the company, not in dispute in the present case; the defendent must as the party omitting them in the contract itself (see policy page 4), be subject to whatever inconvenience may result from their not having definitely incorporated them in the contract made for the use of the plaintiff, and thereby bringing them clearly

to her knowledge, (the application always remaining in its possession).

*Swayne J. in Brittan *vs.* Barnaby. 21 How. 536.
*Chase *vs.* Phœnix L. Ins. Co. 67 Me. 92.

They are referred to in this policy as to their bearing on representations by which the policy should be forfeited (page 4, line 14), (page 5, line 16), (page 5, line 41), and not otherwise.

With all these *facts* and *acts* before it, though not upon so full argument or consideration, the Court below have, in construing this isolated clause alone, held contrary to what appears by the terms used, that, the *original* policy is *not* the one which "shall be continued" when the plaintiff desires, but that *another* and *new* policy shall be *taken out* in *any* even, which is called by the Court a *paid up* policy:

It also held "that the old policy was and could be forfeited" (page 13, line 38), notwithstanding the express words of the policy, speaking last, that it "*should not be forfeited or become void by reason of the non-payment of premium after two annual premiums had been paid,* and that it was made and accepted on the *conditions therein expressed.*" (page 5, line 16).

To such interpretation, the plaintiff *clearly* should not be bound, since the policy itself says, "*it*" shall be continued if anything, for the time, to fix which the rule is given.

How can this language be forced beyond its ordinary beneficial purpose to mean *another* policy? And if not another policy, we are brought face to face with another, positive, inconsistent and unlawful requirement, that the *old* must be *surrendered,* to make way for the new.

If the language does not require another policy, or if knowledge of the defendant's acts did not come to the plaintiff till after the death of her husband, the defendant having the old policy surrendered into its possession and acting for the best interests of the plaintiff, as it must be assumed to have acted, when it acted in her absence and without her assent; the plaintiff contends she is entitled to consider, that the

policy was so kept and continued in force for her benefit (page 12, line 21), rather than cancelled for her injury, (the defendant being estopped by its action within the ninety days to deny this,)

*Cole *vs.* Knickerbocker L. Ins. Co. 63 How. Pr. 442.
*Pitcher *vs.* N. Y. L. Ins. Co. 33 La. Ann. 322.

and that so far as anything appears in the case to the contrary, she is entitled to have the decision, "*that the policy was forfeited by the neglect to pay premiums and to call for a paid up policy,*"

(*Whitehead *vs.* N. Y. L. Ins. Co. 33 Hun. 425.)

reversed as too limited and too much against her, and to have the case remanded, for such action as the Court shall consider meet upon the facts presented, or for hearing as to further facts desired.

Saml. W. Clifford, Jr.
Pltff's atty

Mark A. Blaisdell
of Counsel

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DEFENDANT IN ERROR'S BRIEF AND ARGUMENT.

SUPREME COURT OF THE UNITED STATES.

October Term, 1885.

No. 167.

ABBY BALL KNAPP, PLAINTIFF IN ERROR,

vs.

THE HOMŒOPATHIC MUTUAL LIFE INSURANCE COMPANY.

STILLMAN B. ALLEN,
ALFRED HEMENWAY,
For Defendant.

SUPREME COURT OF THE UNITED STATES.

October Term, 1885.

No. 167.

ABBY BALL KNAPP, PLAINTIFF IN ERROR,

vs.

THE HOMŒOPATHIC MUTUAL LIFE INSURANCE COMPANY.

DEFENDANT'S BRIEF.

A.

The contract upon which the plaintiff bases her claim is a written contract, in precise terms, with certain clear and definite conditions to be complied with, within a stated period, to wit, ninety days from the default of payment of a premium, upon the policy which constitutes the contract. Unless the plaintiff was deceived into quietude by the fraud of defendant during that ninety days, she, having failed to comply with the stated conditions, cannot recover.

B.

The plaintiff now contends that the act of the defendant in cancelling the original policy, at the request of plaintiff's husband and without her knowledge, constituted such fraud

or laches that it is estopped from setting up the ninety days' limitation. But the Court below, Lowell, J., expressly finds (Transcript of Record, page 15) that "the fact that the husband fraudulently procured a cancellation of the policy by the misrepresentation that the plaintiff was dead was not relied on by her as a ground of recovery." And in the same connection the Court adds that the counsel on both sides were asked whether the case of Stillwell *vs.* Mut. Life Ins. Co. 72 N. Y., 385, had any bearing upon this case, and "both agreed that it had not." It further appears (page 15) that "in this case *it was agreed* that the unlawful act of the husband might be disregarded as having had no actual effect upon the conduct of the wife by preventing a payment of premium or an election as to kind of policy to be taken out after the failure to pay in January, 1874; that there was nothing in the cancellation of the policy which implied an estoppel on the defendants in any way.

C.

The above findings are in matters of fact. The Report states (Opinion of Court, page 14) that "the parties waived a trial by jury, and I (Lowell, J.) have heard the case partly on a written statement agreed to by them and partly on oral testimony."

The agreed facts have been quoted above (B). As the oral testimony is not reported, the findings of fact by that Court are final.

D.

There remain only to be considered such matters of law as were argued, and decided by the Court. "The only point argued was the construction of the clause of the policy already recited." This refers to the ninety-day limitation clause referred to above (A) and recited in Opinion of the Court, Transcript, page 14. The only question, therefore, before this Court is the construction of the aforesaid clause.

I.

At the time the insurance was applied for and effected and the policy made and issued, and until the death of plaintiff's husband, all parties interested in the insurance resided in New York City. The defendant was and is a corporation organized under the laws of and doing business in New York, and the application for insurance was made and the policy issued in New York. The *lex loci* applies to, governs and controls the contract.

Green *vs.* Curtis. 3 Cliff. 507.
Lee *vs.* Selleck. 33 N. Y. 615.
McAntrim *vs.* Bloom. 2 Dun. 157.
Baldwin *vs.* Sherman. 1 Rob. 109.
Kelso *vs.* Tobin. 52 Barb. 125.
Dick *vs.* Johnson. 2 Keyes 348.
Goulding *vs.* Davidson. 26 N. Y. 604.

II.

There is no non-forfeiture law in New York as to life insurance policies, and hence there is in this case no liability of defendant beyond the direct terms of the contract embodied in the policy sued on.

Desmaszes *vs.* The Mut. Ben. L. I. Co. Ins. L. J. Vol. 7, p. 926.

III.

By its terms the policy was not to be absolutely forfeited by reason of non-payment of premium when due, nor was it to be absolutely continued in force; but the party insured was *entitled to have it continued in force* for a certain period, upon conditions named therein.

IV.

The conditions under which the party could have the insurance continued were as follows:

1st. The net value of the policy at the time when the first premium became due and was unpaid was to be ascertained in a prescribed manner.

2d. Four-fifths of that value was to be considered as a net single premium for temporary insurance for the full sum five thousand dollars ($5,000), for a time to be ascertained, and a paid-up policy issued therefor; or

3d. The party at his option could receive a smaller paid-up policy (for life) for the full amount of premium paid by him.

4th. ***Provided*** (and this word "provided" refers to the entire immediately preceding clause in the policy, which is included in quotation marks) that unless the original policy be surrendered and *such* paid-up policy, (*i. e.*, of that particular quality or character specified, either a temporary policy for $5,000 for a time to be fixed by computation, or a smaller life policy for the amount of premiums paid,) "*shall be applied for within ninety days after such non-payment of premium as aforesaid, then the original policy was to be void and of no effect.*"

V.

There was no hardship in this agreement to the insured, but a vital necessity to the insurer.

Even after default the contract offered liberal terms to the assured to reinstate herself by surrendering her policy and applying for and taking out a new one, either for $5,000 for a temporary period, or for the amounts of premiums theretofore paid, at her option, at any time within ninety days.

VI.

"Though a Court of Equity will relieve from a penalty or forfeiture introduced for the purpose of security, in case compensation can be made, it cannot interfere to give it a privilege which by the contract could only be acquired by the payment of money (a performance of an act) at a stated period, such payment (or performance) being the stipulated condition upon which it was conferred."

Robinson *vs.* Cropsey, 2 Edw. Ch. 138.
2 Fonbl. on Equity, page 425, etc.

VII.

Time in the payment of premiums is of the substance of the contract, and therefore cannot be relieved except by the express terms of the contract.

Pitt *vs.* Berkshire Life Ins. Co. 100 Mass. 504.
Bigelow *vs.* State Ass. Ass'n. 123 Mass. 113.

VIII.

For these reasons forfeitures in life insurance are looked upon more favorably than in other cases, and we find no case where equity has given relief on the general ground of jurisdiction to relieve against forfeitures.

Robert *vs.* N. E. Mut. Ins. Co. 1 Disney 355.
Bradley *vs.* Chenango Ins. Co. 3 Hill 161.

IX.

The whole scheme of life insurance is based upon certain elements, which must be sustained or the business cannot exist. Among these elements may be enumerated —

1st. The chances of lives.

2d. The chance of forfeitures which in a given amount of business is found to average a given proportion.

3d. The prompt payment of all premiums and their investment at interest.

The man or woman of ordinary prudence need incur no forfeiture, and this business seeks to deal only with such, and could not pay them promptly if it did not exact promptness from others. Now if courts interfere with any of the above elements — say, invent new life tables and enforce their use on the Company, or free all life policy holders from the effects of their negligence or calculation, or absolve them from prompt payment of premiums — the whole business must fail.

Bliss on Life Ins. 262–264.
Pitt *vs.* Berkshire Life Ins. Co. 100 Mass. 500.
Robert *vs.* N. E. Mut. Life Ins. Co. 1 Disney 355.
Union L. I. Co. *vs.* McMillen. 3 Ins. Law Journal 457.

X.

The non-surrender of the old policy and application for a new one was a substantial fact.

The defendant is a mutual company. By its charter, its profits are to be annually divided among its members. All the assured are entitled to participate therein.

A company on making an estimate of their liabilities to declare a profit must know what their liabilities are, what policies are in force and what not; and in order to be able to do that, it fixes in all its contracts a period during which a holder of a policy on which a premium is not paid may surrender his old policy, and, at his option, apply for and receive a larger policy for a stated time or a smaller policy for life; and if neither is applied for during said period, then the dormant right, not asserted nor demanded, shall be void and no longer estimated as a liability. The premiums already paid on such forfeited policies are, therefore, divided among the other

policy holders, and the capital which had been reserved to meet them is distributed according to the rules of the Company.

XI.

It would be most unjust in any event to extend the period of choice beyond the term expressly agreed; otherwise, suppose the assured were by the contract to have his choice for ninety days between a paid-up policy for $5,000 for three years, or a paid-up policy for $750 for life; if the Court can extend this time at all they can extend it for the whole three years, so that the party to be benefited can receive the full benefit of both conditions, *i.e.*, if the death occurs within the three years, the beneficiary takes the whole $5,000; and if the death does not occur, then on the day before the expiration of the three years and when the premium has actually been used up, he can elect to take a paid-up policy for the smaller sum for life.

Indeed, in this case, no proof of death was made—no choice between the large temporary or small life policy was made—no application for a new policy for either, until more than three years had expired.

But this case is not to be decided upon its equity but upon the law. Lord Mansfield says, "*The contract depends upon an event taking place. There is no latitude, no equity; the only question is, has that event happened.*"

Bliss on Life Ins., p. 49.

XII.

There has been no act or omission on the part of the Company that can be treated as a waiver of such forfeiture.

XIII.

Provisions as to limitation are valid.

Amesbury *vs.* Bowditch. Mut. F. I. Co. 6 Gray 596.

This ninety days limitation was a condition subsequent in the contract, or as it is sometimes called, a condition precedent to the right of recovery.

XIV.

"From the very nature of the case the party seeking his indemnity or payment under the contract must bring his case within the provision of the instrument he is undertaking to enforce. The burden is on the plaintiff to present a case in all respects conformable to the terms under which the risk is assumed."

Campbell *vs.* N. E. M. L. I. Co. 98 Mass. 381.

XV.

As a general rule a breach of any of the conditions of the policy terminates the contract.

Bliss on Life Ins., p. 272.

XVI.

Default in payment of premium was made Jan. 16, 1874. By its own terms the policy sued on became null, void and of no effect on the expiration of ninety days from such default, *i.e.*, on the 16th day of April, A.D. 1874.

XVII.

The plaintiff having forfeited all her conditional rights under the contract, and the policy being, by its own terms, null and void, she cannot revive a defunct policy or claim a new one after the policy had expired.

XVIII.

In Caroline P. Bard *vs.* United States Life Ins. Co., a case almost precisely similar to the one at bar, tried in the Supreme Court of New York, March Term, 1877, Van Brunt, J., says:

"This claim clearly limits the right to make a claim against the Company in case the policy has lapsed to a period of twelve months thereafter. I see no reason why this limitation should not be enforced to the same extent that a similar limitation has been sustained in policies of fire insurance. These policies allow the assured in case of loss a certain period in which to commence his action or forfeit all claims against the Insurance Company. These limitations have been upheld and the assured has been held to be bound by them."

Amesbury *vs.* Bowditch. Mut. F. I. Co. 6 Gray 596.

It necessarily follows therefore that no right having been asserted under the policy within the time limited by its terms no action can be maintained thereon.

XIX.

Plaintiff cannot claim that she had no knowledge of her liability. In the original application for insurance, it is agreed and stated that *"any neglect to pay the premium on or before the day it becomes due, shall and will render the policy null and void and forfeit all payments made thereon unless otherwise specially provided for in the policy."*

Baker *vs.* Union Life Ins. Co. 43 N. Y. 283.

Stillman B. Allen
Alfred Hemenway
for deft.